

The Federal Workplace Ombuds

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I. EXECUTIVE SUMMARY

Based on experiences of federal workplace ombuds¹ since the late seventies until today, there is a growing body of information pertaining to the different ways in which federal workplace ombuds offices function. By focusing on ombuds offices in five different agencies,² this Article identifies the areas in which they have had the greatest impact.

The workplace ombuds is generally a highly placed agency employee who is "a neutral member of the [organization] who provides confidential and informal assistance to employees in resolving work-related concerns and is outside the normal management control structure."³ More specifically, the ombuds serves both management and employees as a "confidential and informal information resource, communications channel, complaint-handler and dispute-resolver, and a person who helps an

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¹ Today, because some object to titles which include "man," alternatives to the word "ombudsman" have arisen, including "ombuds," "ombudsperson" and even "ombuddy." VIRGIL M. MARTI, *OMBUDSMAN HANDBOOK* iii (1994) [hereinafter *OMBUDSMAN HANDBOOK*]. Unless specifically counter-indicated, the term "Ombuds" is used in this Article.

² These include the U.S. Secret Service, the U. S. Information Agency International Broadcasting Bureau, the Smithsonian Institution, the U. S. Department of Energy and the U.S. Department of State.

³ Lee P. Robbins & William Deane, *The Corporate Ombuds: A New Approach to Conflict Management*, 2 *NEGOTIATION J.* 195, 197 (1986).

organization work for change”⁴ by recognizing trends, surfacing potential problems or issues and recommending changes. The ombuds has no power to direct that actions be taken or undone but rather may recommend actions or policy change.

This Article contains several case studies of federal agency ombuds offices and, based on that and other information, presents a series of recommendations. The following are circumstances in which a federal workplace ombuds office may be most effective:

1. If an Equal Employment Opportunity (EEO) agency office is beleaguered with complainants who are not presenting EEO matters.
2. If an Employee Assistance Program (EAP) office is receiving workplace complaints that are outside the EAP office’s mandate.
3. If the personnel-related offices are not working together as a team.
4. If employee morale is low.
5. If communications between employees and management are suffering.
6. If management is caught by surprise by the emergence of significant workplace issues.
7. If management and unions are constantly at loggerheads.
8. If an agency has been faced with numerous claims of retaliation.

This Article also underscores certain design elements essential to the effective functioning of the ombuds office, such as soliciting stakeholders’ views prior to initiating the program, and ensuring that the ombuds is a high-ranking employee, supported by and reporting to top management and able to maintain confidentiality of all dispute resolution communications. This Article also discusses the particular difficulties encountered by federal

⁴ Mary P. Rowe, *Options, Functions and Skills: What an Organizational Ombudsman Might Want to Know*, 11 NEGOTIATION J. 103, 103 (1995).

agencies in attempting to maintain and ensure confidentiality in ombuds offices.

II. INTRODUCTION

In 1990, the Administrative Conference of the United States (ACUS) commissioned a study⁵ and issued recommendations⁶ encouraging the establishment of federal ombudsmen who “investigate *external* grievances against the government and recommend ways of dealing with the grievances they consider meritorious.”⁷ Since neither the study nor the recommendations addressed the role of federal *workplace* ombuds, ACUS, prior to its closing, requested the author to report on this growing federal function. The purpose was to learn whether federal workplace ombuds have been effective. If so, the study would seek to identify the ways in which they have had the greatest impact.

The experiences of federal workplace ombuds, beginning in the late seventies with the Smithsonian Ombuds Office, provide a growing body of information pertaining to how these offices function. There are differences among the federal offices and, to some extent, with the ombuds in the private sector. The broad guidelines of the ombudsman’s description and the novelty of the position provide the ombuds with great latitude and flexibility to structure the office as most appropriate for the ombuds and the organization.⁸

The workplace ombuds is an agency employee who is “a neutral member of the [organization] who provides confidential and informal assistance to employees in resolving work-related concerns and is outside the normal management control structure.”⁹ More specifically, the ombuds serves both management and employees as a “confidential and informal information resource, communications channel, complaint-handler and

⁵ See generally DAVID R. ANDERSON & DIANE M. STOCKTON, *OMBUDSMEN IN FEDERAL AGENCIES: THE THEORY AND THE PRACTICE* (1990).

⁶ See *The Ombudsman in Federal Agencies*, Admin. Conf. of the United States, Recommendation 90-2, 1 C.F.R. § 305.90-2 (1993).

⁷ OFFICE OF THE CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *THE OMBUDSMAN: A PRIMER FOR FEDERAL AGENCIES 2* (1991) (emphasis added).

⁸ See Deborah M. Kolb, *Corporate Ombudsman and Organization Conflict Resolution*, 31 CONFLICT RESOL. 673, 675 (1987).

⁹ Robbins & Deane, *supra* note 3, at 197.

dispute-resolver, and a person who helps an organization work for change."¹⁰

A workplace ombuds is a highly placed individual, often reporting to the agency or division head, but not part of line management. This helps to preserve the independence, neutrality and credibility of the ombuds. The ombuds has no power to direct that actions be taken or undone but rather, working with internal staff, recommends actions or policy change. The decision-making power at all times rests with management. Another key facet of the function is that the person seeking the ombuds's assistance, who in this Article is called the "inquirer," is encouraged to consider all options available to him or her. Since the ombuds's role generally is to help people help themselves, she will typically explore with the inquirer the option of discussing the matter directly with her supervisor without the ombuds's direct involvement. If the inquirer deems this approach inappropriate or ineffective, the ombuds may become directly involved in resolution efforts.

III. EVOLUTION OF THE WORKPLACE OMBUDS¹¹

*"The ombudsman has come to America's startled attention as a kind of Scandinavian fairy tale."*¹²

The ombuds function has existed for almost two hundred years. The workplace ombuds, however, is a relatively new phenomenon. In the last

¹⁰ Rowe, *supra* note 4, at 103.

¹¹ The word "ombudsman" can be traced back to the Frostathing Law of 1274 in Norway, in which an ombudsman was an agent, one who had power to act for another. See Lester B. Orfield, *The Scandinavian Ombudsman*, 19 ADMIN. L. REV. 7, 7 n.2 (1966) (citing LAURENCE M. LARSON, *THE EARLIEST NORWEGIAN LAWS BEING THE GULATHING AND THE FROSTATHING LAW TRANSLATED FROM THE OLD NORWEGIAN* 409 (Records of Civilization, Sources and Studies Series No. 20) (1935)). According to Stanley V. Anderson, one of the two punishments that could be inflicted on lawbreakers of early Germanic tribes was a fine to be paid by the family of the culprit to the family of the aggrieved person. The neutral person who was appointed to collect the fine and deliver it to the victim was called an Om ("about") bud (the messenger collecting the "fine"). See generally STANLEY V. ANDERSON, *OMBUDSMAN PAPERS: AMERICAN EXPERIENCE AND PROPOSALS* (1969).

¹² Isidore Silver, *The Corporate Ombudsman*, HARV. BUS. REV., May-June 1967, at 77, 77 (emphasis added).

twenty years it has begun spreading throughout the country in both the public and private sector. The precise reasons for its evolution have never been thoroughly identified. According to Dr. Mary Rowe, Ombudsperson at the Massachusetts Institute of Technology (MIT), there was simply a need causing several corporations independently to "invent the wheel."¹³

The original purpose of the ombuds was to protect the citizenry from the abuse of governmental power. In establishing its ombuds in 1809 pursuant to constitutional mandate, Sweden became the first country to establish a national ombuds,¹⁴ the "Justitieombudsmän."¹⁵ In 1919, Finland became the second country to establish an ombuds.¹⁶ It was over thirty-five years later before other countries adopted the concept: Denmark in 1955 and Norway and New Zealand in 1962.¹⁷ Although the duties and jurisdiction of each office varied somewhat, they were all appointed by the legislature and empowered to review executive branch decisions. They also had discretion to issue public reports of their findings.¹⁸

American interest in the ombuds idea did not really begin to blossom until after the mid-1950s when Stephan Hurwitz, the first Danish ombudsman, spread the word about the practice of ombuds internationally through articles, lectures and visits.¹⁹ American scholars, lawyers and politicians then began exploring its application to the United States.²⁰

¹³ Telephone Interview with Dr. Mary P. Rowe, Ombudsperson at the Massachusetts Institute of Technology and expert in the practice of ombuds (July 6, 1996).

¹⁴ See David R. Anderson & Diane M. Stockton, *Federal Ombudsmen: An Underused Resource*, 5 ADMIN. L.J. 275, 279 (1991) (citing Henry S. Reuss & Stanley V. Anderson, *The Ombudsman: Tribune of the People*, 363 ANNALS AM. ACAD. POL. & SOC. SCI. 44, 45 (1966)).

¹⁵ WALTER GELLHORN, OMBUDSMEN AND OTHERS: CITIZEN'S PROTECTORS IN NINE COUNTRIES 194 (1966).

¹⁶ See Anderson & Stockton, *supra* note 14, at 280.

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See generally ANDERSON, *supra* note 11; GELLHORN, *supra* note 15; WALTER GELLHORN, WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES (1966); DONALD C. ROWAT ET AL., OMBUDSMAN FOR AMERICAN GOVERNMENT? (Stanley V. Anderson ed. 1968); DONALD C. ROWAT, THE OMBUDSMAN: CITIZEN'S DEFENDER (Donald C. Rowat ed., 2d ed. 1968); Henry A. Abraham, *A People's Watchdog Against Abuse of Power*, 20 PUBLIC ADMIN. REV. 152, 152-157 (1960); Anderson & Stockton, *supra* note 14.

Until the late sixties, the ombuds primarily dealt with the public, investigating and responding to complaints on agencies' behavior. The ombuds may have been affiliated with a government agency or may have been created by statute. The common attributes of the Scandinavian Ombuds model were:

1. All [were] instruments of the legislature but function[ed] independently of it, with no links to the executive branch and with only the most general answerability to the legislature itself.
2. All [had] practically unlimited access to official papers bearing upon matters under investigation, so that they [could] themselves review what prompted administrative judgment.
3. All could express (publicly, if necessary) an *ex officio* expert's opinion about almost anything that governors did and that the governed did not like.
4. All [took] great pains to explain their conclusions, so that both administrators and complaining citizens [would] understand the results reached.²¹

From the seventies to the present, the concept of the ombuds began to evolve more flexibly. Prisons, universities and corporations began establishing ombuds offices.²² By the late eighties in the United States, five states had classic ombuds offices; each state had a long-term care ombuds; and many cities had ombuds offices, as did dozens of school systems, prisons and mental-health organizations.²³ In addition, "client" ombuds proliferated, including thousands of patient representatives in hospitals, over thirty-five newspaper ombuds serving readers, public utility and public service ombuds and ombuds for public agencies. Professional

²¹ WALTER GELLHORN, *WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES* 9-10 (1966).

²² See Douglas Ivor Brandon et al., *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 1032-1033 (1984).

²³ See Telephone Interview with Dr. Mary Rowe, *supra* note 13.

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associations had ombuds officials serving their membership.²⁴ "There [were] at least [one] hundred college and university ombuds offices and at least two hundred ombuds offices [in] corporations in North America."²⁵

Isidore Silver, then an Assistant Professor of Business Law at the University of Massachusetts, was one of the first to suggest application of the principles of ombudsmanry to the workplace. His notion evolved from readings on the Swedish model of applying collaborative efforts to limit corporate conflict. He was concerned about social and corporate responsibility and how the individual could be heard in a big bureaucracy.²⁶ In 1967, Silver wrote:

If the corporation is to provide fair and equal treatment to employees, it should ideally combine the virtue of fair-mindedness with the necessities of thrift and efficiency. Such an impartial grievance outlet exists in the political world and, I would argue, could readily be adapted to the corporate realm. It is the institution of the ombudsman.²⁷

In 1969, Stanley V. Anderson proposed that "[a] powerful case can be made for ombudsman-like institutions in all businesses and professions dealing with people"²⁸ as long as the ombuds is not a substitute for adequate internal grievance machinery, a public advocate or an information and referral service. In a 1972 article, J.H. Foegen further developed and promoted the concept of a workplace ombuds.²⁹ Like Silver, Foegen was impelled by concerns that as corporations continued growing in size two problems would result: "a diminished voice for individuals and . . . greater pressure on the formal system, resulting in slower service."³⁰ As a method for "cutting [through the] red tape," he suggested that "the highest level company and union officials," with input from rank and file, "should appoint a knowledgeable, respected person from the community to serve

²⁴ See Mary P. Rowe, *Ombuds Jobs are Proliferating, and Characterized by Diversity*, 2 ALTERNATIVE DISP. RESOL. REP. (BNA) 198, 198-199 (May 25, 1988).

²⁵ *Id.* at 199.

²⁶ See Telephone Interview with Professor Isidore Silver (Feb. 16, 1996).

²⁷ Silver, *supra* note 12, at 77.

²⁸ ANDERSON, *supra* note 11, at 58.

²⁹ See J. H. Foegen, *An Ombudsman as Complement to the Grievance Procedure*, 23 LAB. L.J. 289, 294 (1972).

³⁰ *Id.* at 289.

[as ombuds] for an agreed-upon term.”³¹ Assuming this person had “availability, neutrality and power,” the ombuds would provide the employee with an “expressway to the top.”³² He theorized that “pressure on the formal system would be reduced” and matters would be resolved more expeditiously.³³ He warned, however, that major resistance would be “likely if the proposed [ombuds] is [viewed] as a substitute for the regular grievance procedure.”³⁴

After these initial articles, little if anything was written in the area of workplace ombuds for several years. By 1982, however, there was sufficient interest in workplace ombuds practice that seven people met in the President’s Conference Room at MIT and informally began The Corporate Ombudsman Association.³⁵

Beginning in the late seventies, federal executive agencies began establishing workplace ombuds programs as well.³⁶ In 1977, the Smithsonian Institution established a workplace ombuds.³⁷ In 1985, the United States Information Agency (USIA) briefly established an ombuds program. In 1988, the ombuds was reestablished for the Voice of America, the international broadcasting division of USIA.³⁸ In 1987, the United

³¹ *Id.* at 293.

³² *Id.* Foegen’s use of the term “power” in this context is potentially misleading. His concern is that the Ombuds have “enough power to be heard effectively anywhere in the organization” and that top-management’s support for the Ombuds is “overt and publicized.” *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ See OMBUDSMAN HANDBOOK, *supra* note 1, at 6–1. The Corporate Ombudsman Association was formally established in 1985. In 1992, as the diversity of its membership grew, the association changed its name to The Ombudsman Association. See *id.*

³⁶ A notable exception was an early pilot organizational ombudsman program established from April through October 1971 in the Federal Aviation Administration Western Region. See FED. AVIATION ADMIN., U.S. DEP’T OF TRANSP., THE USE OF AN ORGANIZATION OMBUDSMAN IN THE FEDERAL AVIATION ADMINISTRATION WESTERN REGION 1971 (W. Bruce Chambers & James L. Lampl eds., 1971). While the program evaluation was very positive, there are no records indicating whether the program continued beyond the six month pilot program.

³⁷ See Interview with Chandra Heilman, Smithsonian Institution Ombuds (Oct. 18, 1995).

³⁸ See Interview with Robert Henry, United States Information Agency (USIA) International Broadcasting Bureau Ombuds (Nov. 28, 1995).

States Secret Service established a pilot ombudsman program.³⁹ Towards the end of the same year, Congress directed the United States Department of State to establish an "Ombudsman for Civil Service Employees."⁴⁰ Into the nineties, other federal agencies have continued to experiment with the ombuds concept.⁴¹

By 1988, ombuds jobs were proliferating with estimates that at least two hundred ombuds offices existed within corporations in North America.⁴² This growth has been attributed to "increasing heterogeneity in the workforce, rapidly changing laws and statutes, an increasingly well-educated employee pool, and stresses associated with huge increases in government contracting."⁴³

Arguably, however, one of the most significant influences on the growth of the corporate ombuds function came in 1991 from the United States Sentencing Commission, which created guidelines for sentences imposed on corporations as a result of illegal activity of their employees.⁴⁴ Under these guidelines, penalties are influenced by the ethical climate within the organization. The guidelines state that if certain programs have been established, the penalties may be lowered even if the corporation has been found in violation of civil or criminal laws.⁴⁵

³⁹ See Brian Gimlett, *U.S. Secret Service Uses Ombudsman to Help Reduce Personnel Problems*, 2 WORLD ARB. & MEDIATION REP. 19, 19 (1991).

⁴⁰ See Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 § 172, 22 U.S.C. § 2664(a) (1994).

⁴¹ In 1991, ACUS issued a report and recommendations encouraging agencies to consider establishing an ombudsman. See *The Ombudsman in Federal Agencies*, Admin. Conf. of the United States, Recommendation 90-2, 1 C.F.R. § 305.90-2 (1993); Anderson & Stockton, *supra* note 5. Although that study and the concomitant recommendations focused almost exclusively on ombuds who dealt with concerns originating external to the agency, the recommendations have been used as support in developing and legitimizing federal workplace ombuds.

⁴² See Rowe, *supra* note 24, at 199.

⁴³ Mary P. Rowe, *The Corporate Ombudsman: An Overview and Analysis*, 3 NEGOTIATION J. 127, 127-139 (1987).

⁴⁴ See U.S. SENTENCING GUIDELINES MANUAL ch. 8 (1995).

⁴⁵ An "effective program to prevent and detect violations of law" is a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct. . . . The hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents.

By December 1997, The Corporate Ombudsman Association had evolved from the small group of seven, meeting in the MIT conference room, into an active association with 299 members and associate members and an annual conference.⁴⁶ The number of offices of federal workplace ombuds has grown to thirteen,⁴⁷ and the number of corporate ombuds has grown to over one thousand.⁴⁸

After twenty years of development, the definition and function of a workplace ombuds has evolved. According to Rowe, a workplace ombuds is:

a confidential and informal information resource, communications channel, complaint-handler and dispute-resolver, and a person who helps an organization work for change Their purpose is to foster values and decent behavior--fairness, equity, justice, equality of opportunity, and respect The organizational ombudsperson is a designated neutral within an organization and usually reports at or near the top of that organization, outside ordinary management channels.⁴⁹

Both the designation of neutrality and direct access to the chief executive officer help to preserve the independence and contribute to the effectiveness of ombudspeople.⁵⁰

The current understanding and practice of ombuds, then, is very broad and flexible with an array of applications in different situations.

Id. § 8A1.2 commentary 3(k). One of the required steps is "to achieve compliance with its standards, *e.g.*, . . . by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution." *Id.* § 8A1.2 commentary 3(k)(5).

⁴⁶ See Telephone Interview with Carole Trocchio, Executive Director of The Ombudsman Association (Mar. 1998).

⁴⁷ Federal workplace ombuds exist at the U.S. Secret Service, Smithsonian Institution, U.S. Department of Energy, U.S. Department of State, Central Intelligence Agency, Office of Research Services--National Institutes of Health, Alcohol, Tobacco and Firearms, Naval Criminal Investigative Service, U.S. Social Security Administration, United States Information Agency International Broadcasting Bureau, Federal Bureau of Investigation, U.S. Capitol Police and the Federal Deposit Insurance Corporation.

⁴⁸ See Telephone Interview with Dr. Mary P. Rowe, *supra* note 13.

⁴⁹ Rowe, *supra* note 4, at 103. Rowe refers to an "organizational" ombuds practitioner. The term "organizational ombudsperson" is more inclusive, referring to an ombuds who serves internal staff, clients of the organization or both. See *id.* at 104.

⁵⁰ See *id.* at 103

IV. AGENCY CASE STUDIES

This section describes the array of applications through five federal workplace ombuds: the Smithsonian Institution, United States Information Agency-United States Broadcasting Services, United States Secret Service, United States Department of State and United States Department of Energy. Each of these offices is currently operating and provides essential information regarding the functioning of workplace ombuds within the federal structure. These five offices were selected out of thirteen federal ombuds offices to provide a balance in terms of longevity, genesis and logistics.

Each of the following discussions is based on detailed oral interviews with the ombuds and, if applicable, an assistant, a member of the EEO office and representatives from other offices that provided arguably overlapping services, such as the EAP, legal department, union or grievance office.⁵¹ The interviews were conducted in 1995 and 1996 and the Article is therefore based on information available at that time. Individuals from related offices were included in the Article based on the view that an ombuds office is but a part of an agency's overall dispute resolution mechanism, including other formal and informal procedures.⁵² After examining what has worked and what has not worked in each of these offices, lessons and recommendations regarding possible expansion and functioning of future federal workplace ombuds offices can be extracted.

A. *United States Secret Service*1. *Agency Description and Impetus to Create the Ombuds Office*

The United States Secret Service is a bureau within the Treasury Department with 4755 employees, 2065 of whom are special agents, 1152 are police officers and 1538 are professional, technical and administrative personnel. There is no union presence at the Secret Service. The Secret

⁵¹ In accordance with the practice of the *Ohio State Journal on Dispute Resolution* I will refer to the ombuds as "she" throughout the Article. The decision whether to interview a representative of a particular office was made jointly by the ombuds and the author. As with Kolb's research into the ombuds practice, I was unable to interview inquirers because of confidentiality concerns. See Kolb, *supra* note 8, at 677.

⁵² See Mary P. Rowe, *The Ombudsman's Role in a Dispute Resolution System*, 7 NEGOTIATION J. 353, 356-357 (1991).

Service has a two-fold mission: to investigate crimes against the currency and certain other securities and to protect the President and family, the Vice President and family, former presidents and spouses, foreign heads of state and major presidential candidates during campaign years. Employees are located throughout the United States as well as at various locations overseas. Headquarters are in Washington, D.C.

The Secret Service Ombudsman Program was developed in December 1986 when management determined that the Uniformed Division, which comprised approximately twenty-five percent of the Secret Service workforce, was "experiencing an abnormally high number of personnel problems compared with . . . other organizational units."⁵³ In addition, according to the EEO manager, many of these complaints in the Uniformed Division did not fall within either EEO or grievance procedures. After bringing in consultants to evaluate the problems, the Secret Service learned that employees' "major perceptions" of workplace problems were "incomparability [of pay], injustices in the evaluation and promotion system, . . . lack of consistency, fairness 'and mutual respect within the division, and inconsistencies in . . . policies and procedures' and their inequitable application."⁵⁴ In addition, the consultants learned that the EEO procedures were being used in a way inconsistent with their purpose:

The fact that the formal administrative grievance procedure was viewed with a jaundiced eye had [resulted in a trend whereby] employees who wished a fair investigation of an issue, or just to strike back at a supervisor or the Division, [would resort] to fil[ing] an EEO complaint even when the employee [honestly did not feel that the issue was a result of] discrimination.⁵⁵

Based on the consultants' recommendations the Service initiated a pilot ombudsman program in the Uniformed Division on October 15, 1987.⁵⁶ Its evaluation after the first year found that management and employees were pleased with the performance of the office: employees reported that they had "someone to turn to when they could not resolve an issue," tensions were reduced and policies and procedures were modified and approved.⁵⁷

⁵³ Gimlett, *supra* note 39, at 19.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *See id.*

⁵⁷ *Id.* at 20. The report is unclear as to whether management was similarly polled.

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Although there was some concern initially that the ombuds office was infringing on management's supervisory authority, in 1989 the Service Director expanded the ombuds jurisdiction to include all Service employees and supervisors.⁵⁸ Since 1989, there have been three Special Assistants to the Director (SATD) who have served as chief ombuds for the Service. The current ombuds was assigned in April 1995.

2. Mission and Structure of the Ombuds Office

The mission of the ombuds program at the Secret Service is to assist in seeking fair, equitable solutions to work-related concerns through an informal confidential process. According to the ombuds brochure, the ombudsman "also provides unfiltered feedback to management by reporting issues and trends—without discussing names."⁵⁹ During an interview, however, the current ombuds noted that while "upward feedback" regarding Service policies and procedures is one of the responsibilities of the ombuds, he, thus far, had not encountered situations requiring him to engage in that aspect of his job.⁶⁰ The Service's ombuds program is open to all Service employees, at all levels, regarding all workplace issues including interpersonal conflicts, workplace disputes, safety issues, bureaucratic red tape and harassment.⁶¹ "Success," according to the current ombuds, is to be able to continue the ombuds program for employees as an option:

[It is not essential] to solve every problem in the agency. Some things just can't be solved. A successful program is not generated on statistics. . . . Success is that it is out there, employees know about it as a viable option, and they use it. The ultimate result should be a workforce that feels it is being treated fairly with regard to work-related issues.⁶²

⁵⁸ See Telephone Interview with Art Pettaway, Secret Service EEO Manager (Jan. 1996).

⁵⁹ DEPARTMENT OF THE TREASURY UNITED STATES SECRET SERVICE, OMBUDSMAN PROGRAM BROCHURE ¶ 1 (on file with author) [hereinafter SECRET SERVICE OMBUDSMAN BROCHURE].

⁶⁰ Interview with Dan Petrole, Secret Service Ombuds (Mar. 28, 1996).

⁶¹ See SECRET SERVICE OMBUDSMAN BROCHURE, *supra* note 59, ¶ 3

⁶² See Interview with Dan Petrole, *supra* note 60.

The ombuds program states very clearly in its literature that while the program is available as an alternative method of addressing employee concerns, it "is not intended to replace or circumvent the formal Administrative Grievance Procedure, EEO system or the duties and responsibilities of the Office of Inspection."⁶³ The ombuds program will not discuss a matter with an employee if he or she is in a formal process. An ombuds will also withdraw if an inquirer has retained counsel. In all cases, however, the employee reserves the right to file a formal complaint through the relevant administrative system as long as the requirements for that system are met.⁶⁴ According to the Service EEO manager, the Service EEO office tries to be flexible in terms of time deadlines for contacting an EEO counselor if the reason for delay is that an employee has sought the assistance of the ombuds.⁶⁵ However, if the matter is not resolved and the employee chooses to file a formal complaint, it must be processed by the Department of Treasury EEO office. It is likely that the Department will reject the inquirer's formal complaint if time requirements have not been met.⁶⁶

A cornerstone of the ombuds approach is to encourage and empower the employee to discuss the matter directly with those involved.⁶⁷ If that does not resolve the matter, the employee is encouraged to discuss the matter with his or her supervisor. If that fails or is impracticable for any reason, the ombuds may intervene. With the inquirer's permission, the ombuds will generally attempt to discuss the matter first with first-line management. Only if this is unsuccessful and the inquirer grants permission will the ombuds consider discussing the matter with management up the chain of command.⁶⁸

The structure of the Service ombuds program is unusual in the federal government in that there is one SATD, a GS-15,⁶⁹ and a number of

⁶³ U.S. SECRET SERVICE, U.S. SECRET SERVICE DIRECTIVES MANUAL § ADM-3(2), at 1 (1989).

⁶⁴ *See id.* at 2.

⁶⁵ *See* Telephone Interview with Art Pettaway, *supra* note 58.

⁶⁶ *See id.*

⁶⁷ *See Methods of handling ethics complaints at MIT and the U.S. Secret Service*, ETHIKOS, Nov./Dec. 1990, at 7-9.

⁶⁸ *See id.*

⁶⁹ Federal agencies use a position classification system that divides workers primarily into general schedule (GS) employees and senior executive service (SES).

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“collateral duty” ombuds serving throughout the United States.⁷⁰ The SATD is selected by and reports on paper to the director of the Service, who has delegated program development and management to the deputy director. The deputy director also conducts the SATD’s annual evaluation. The collateral duty ombuds are employees who have full-time jobs at the Service, unrelated to their ombuds’s function. Each ombuds performs her work in addition to her full-time job at the Service. The collateral duty ombuds reflect a diversity of racial and ethnic identities, geographic locations, grade levels and divisions within the Service. Currently, the ombuds office has twelve collateral duty ombuds who report in their ombuds capacity directly to the SATD. The collateral duty ombuds receive training and guidance from the SATD. In addition, all collateral duty ombuds participate in training sponsored by a national ombuds association. In the event that a collateral duty ombuds is unable to resolve the matter or experiences a conflict of interest, she is encouraged to call the SATD either to explore options or to refer the matter to him. With respect to their full-time employment, they continue to be evaluated by their current rating official, who receives input from the SATD regarding performance of the ombuds-related functions.⁷¹

The SATD obtains information in several ways: by participating as a member of the director’s staff in senior staff meetings, by participating in task forces, by listening to the inquirers and by walking the halls and speaking to people.⁷²

The SATD estimated that he spent approximately 35% of his time handling cases and calls that are specifically related to an inquirer and consulting with the collateral duty ombuds on their cases.⁷³ He spends little time, on average, working on systemic change issues, in part because he has not identified such issues as yet.⁷⁴ Approximately 25% of his time is spent on promoting or publicizing the ombuds program and slightly over

Depending on seniority, a GS-15 in Washington, D.C. in 1996 earned an annual salary between \$73,486 and \$95,531.

⁷⁰ The ombuds program at the Bureau of Alcohol, Tobacco and Firearms (ATF) also follows this model. Both the Service and ATF are agencies within the Department of the Treasury.

⁷¹ See Interview with Dan Petrole, *supra* note 60.

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See *id.*

10% on training.⁷⁵ Participating in task forces or meetings unrelated to any of the above consumes about 5% of his time and general information gathering consumes approximately 20% of his time.⁷⁶

3. *Basic Elements: Confidentiality and Neutrality*

According to the Service brochure, "confidentiality is the rule. . . . Ombudsmen take no action without permission unless criminal behavior is involved, or a life has been threatened."⁷⁷ To date, he has never had to break a confidence.⁷⁸ Confidentiality of the ombuds process appears to be supported throughout the agency. In fact, the current SATD stated that his ability to maintain confidentiality is of key importance in the agency.⁷⁹ This was confirmed by the EEO manager who believed that confidentiality was the "saving grace" of the ombuds program and the EAP coordinator who underscored the importance of the ombuds office's ability to maintain confidentiality of communications with people under stress.⁸⁰

Recently, however, one of the collateral duty ombuds was subject to subpoena in an EEO matter about an ombuds-related matter. The SATD argued against her appearance, underscoring the need for confidentiality and the availability of the information elsewhere.⁸¹ The Department of Justice attorney representing the agency had just agreed to revisit the issue when the case was settled and the matter became moot. There have been no Freedom of Information Act (FOIA) requests or requests from the Inspector General's Office for Ombuds documents or discussions with the legal department in anticipation of such requests.

To support its requirement for confidentiality, the SATD has his own office, apart from others of the director's staff, and does all his own

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ SECRET SERVICE OMBUDSMAN BROCHURE, *supra* note 59, ¶ 6. The Code of Ethics of The Ombudsman Association states, in relevant part, "[t]he Ombudsman, as a designated neutral, has the responsibility of maintaining strict confidentiality concerning matters that are brought to his/her attention unless given permission to do otherwise. The only exceptions, at the sole discretion of the Ombudsman, are where there appears to be imminent threat of serious harm." OMBUDSMAN HANDBOOK, *supra* note 1, at 2-5.

⁷⁸ See Interview with Dan Petrole, *supra* note 60.

⁷⁹ See *id.*

⁸⁰ See Telephone Interview with Art Pettaway, *supra* note 58.

⁸¹ See Interview with Dan Petrole, *supra* note 60.

support work except for general correspondence unrelated to specific inquirers.⁸² The office is locked when the SATD is not present and, except for a second key in a special officer's desk, no one else has access.⁸³ All case files are in a locked desk drawer to which only the SATD has the key.⁸⁴ Within the office is an answering machine unrelated to other agency systems. As soon as a case is completed, he destroys all his notes.⁸⁵ The only information he retains is statistical or generic, none of which could be used to identify particular individuals.⁸⁶

Neutrality/independence is another key element in establishing the ombuds program. Because the ombuds has no line authority, his reporting relationship and widely-known access to the director is significant. The current SATD was not aware of any challenges by senior management to his neutrality.⁸⁷ The EAP coordinator underscored that he had been impressed with the SATD's neutrality and cited this clear objectivity as one of the ways in which the ombuds office had functioned particularly well.⁸⁸

4. *Is It Working?*

Management has not sought formal program evaluation or justification in part because of the institutionalization and successful reputation of the program. On a periodic basis, the SATD develops reports on the ombuds program to review the issues raised and to spot trends in workplace issues.⁸⁹ By identifying two or three cases that most likely would have gone to litigation, the SATD establishes the cost effectiveness of the program. One recent report prepared by the previous SATD noted the characteristics of clients by gender, race, position and location. The results demonstrated

⁸² *See id.*

⁸³ *See id.*

⁸⁴ *See id.*

⁸⁵ The Code of Ethics of The Ombudsman Association states, in relevant part, "[t]he Ombudsman must take all reasonable steps to protect any records and files pertaining to confidential discussions from inspection by all other persons, including management." OMBUDSMAN HANDBOOK, *supra* note 1, at 2-5.

⁸⁶ *See* Interview with Dan Petrole, *supra* note 60.

⁸⁷ *See id.*

⁸⁸ *See* Interview with Ralph Biase, EAP Coordinator (Dec. 1995).

⁸⁹ *See* Interview with Dan Petrole, *supra* note 60.

that the employees using the program were roughly proportional to the Service-wide population.⁹⁰

The report also identified the issues raised and compared them to the issues and concerns raised in 1990. The largest number of concerns came from management-related issues, although they have decreased significantly since 1990. The biggest increase came from concerns around pay and compensation. In the first four months of his tenure as SATD, the current ombuds received approximately fifty cases. On an average annual basis, he estimates that the ombuds office sees approximately four to six percent of the Service's 4400 employees.⁹¹

Perhaps because of the confidentiality of the office, or perhaps because of the acceptance and appreciation of the ombuds program, the SATD has to date been aware of only one allegation of retaliation against an inquirer.⁹² The SATD immediately solicited the assistance of the supervisor of the alleged retaliator. That supervisor spoke with the alleged retaliator, underscoring the importance of the ombuds program to the agency and ordering the retaliator to stop.⁹³

The views of offices with overlapping responsibilities were also solicited for this Article. For example, the Service EEO manager was very supportive of the ombuds office. He felt that the ombuds office was "very effective."⁹⁴ Just the existence of the office conveyed a message to employees that management cared. He and the SATD jointly conduct some supervisory training and participate in minority task-force meetings. They also confer on certain EEO related cases and the ombuds office will refer cases as appropriate to the EEO office. According to the EEO manager, as a result of the ombuds program, the number of cases the EEO office must process has fallen.⁹⁵ The ombuds program has handled non-EEO cases that, prior to establishment of the ombuds program, were entering the EEO system. The decrease in these cases has led to increased availability of resources in the EEO office for resolving and processing cases that have clearer EEO implications.⁹⁶

⁹⁰ *See id.*

⁹¹ *See id.*

⁹² *See id.*

⁹³ *See id.*

⁹⁴ Telephone Interview with Art Pettaway, *supra* note 58.

⁹⁵ *See id.*

⁹⁶ *See id.*

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The EAP coordinator was similarly supportive of the ombuds program. He reported that when the office was established, he was relieved because he had another ally and another source of help.⁹⁷ He believes that the stress that he and the employee seek to address often originates in workplace problems. He and the ombuds program work together to help resolve employees' problems.⁹⁸ At a first meeting between the employee and the ombuds, the EAP coordinator might also attend. He could then either continue to participate or simply refer the client to the ombuds. At other times, the ombuds might seek the EAP coordinator's general advice or, with the inquirer's permission, discuss a specific matter.⁹⁹

B. United States Information Agency (USIA) International Broadcasting Bureau (IBB)

1. Agency Description and Impetus for Creating the Ombuds Office

USIA, established in 1953, is an independent foreign affairs agency within the executive branch of the federal government. Its role is to explain and support American foreign policy and to promote national interests through a wide range of educational and cultural overseas information programs. It has more than 200 posts in 143 countries. Its headquarters are in Washington, D.C. USIA has approximately 7300 positions, fifty percent of which are located overseas. The IBB, established in 1994, is a sub-unit of USIA, comprised of the Voice of America (VOA), Radio and TV Marti and WORLDNET Television. Voice of America's approximately 3000 employees broadcast more than 900 hours of programming weekly in forty-seven languages to an international audience.¹⁰⁰ IBB is run by a bipartisan Broadcasting Board of Governors, one of whom, the Director of USIA, serves as an *ex-officio* member of the Board.¹⁰¹ There are currently three unions in IBB: Association of Federal Government Employees (AFGE), the largest union, American Foreign Service Association (AFSA) and National Federation of Federal Employees (NFFE).

⁹⁷ See Interview with Ralph Biase, EAP Coordinator, *supra* note 88.

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See U.S. INFO. AGENCY, FACT SHEET 1 (1996).

¹⁰¹ See NEWS RELEASE, U.S. INFO AGENCY, RELEASE NO. 047-95 (1995).

In 1985, USIA established an ombuds office. The position was filled initially by a political appointee who was not conversant with the requirements of an ombuds office and, according to a member of the executive board of one of the union locals, the executive board was strongly against creation of the position.¹⁰² The union was concerned that an ombuds would negatively impact the union. At the time, USIA felt that the union should be the employees' sole representative and that all the problems of bargaining-unit employees should be funneled through the union. USIA was concerned that if the employee sought assistance from the ombuds rather than the union, resolutions would be inconsistent and not handled pursuant to contractual parameters regarding time limits and prescribed remedies. The office was very short-lived.

In 1988, the idea of an ombuds office again surfaced as a way to deal with employee concerns in the VOA division within USIA. VOA was concerned that the formal processes were not adequately addressing workplace problems. Many employees perceived both the EEO office and the unions to be ineffective and did not trust the personnel office to be objective. Without any trusted avenue of redress, workplace disputes were proliferating.

In May 1988, the former VOA Director of Administration, Robert Henry, was selected to work part-time as the VOA ombuds to serve employees of VOA and Radio Marti.¹⁰³ He reported directly to the VOA Director. Establishing the office was an evolutionary process. Even though The ombuds had developed a reputation for being fair and unbiased, he met with a great deal of animosity in the beginning. The unions were very concerned about creation of the office and perceived him as a management tool to deny employees their rights. They even went so far as to intentionally exclude him from meetings in which he arguably should have participated and they told key union members to stay away from him. In addition, middle to upper level management was wary about the office's existence.¹⁰⁴

These problems occurred at least in part because the office was simply created by the VOA Director without working to gain buy-in from the unions, related offices and management. Over the next few years, The

¹⁰² See Telephone Interview with Marie Ciliberti, executive board member (Mar. 8, 1996).

¹⁰³ See Interview with Robert Henry, *supra* note 38.

¹⁰⁴ See *id.*

ombuds was very careful to demonstrate that he was not antagonistic to the union. Similarly, he stayed in close contact with labor relations officials and solicited their advice and opinions. With respect to management's concerns, The ombuds benefited from his more than twenty-five years with the agency. He knew many of the managers personally and tried to bring them into the process when he could legitimately do so. He shared information to prevent surprises and tried to serve as an "early warning system" to management while maintaining his neutrality and confidentiality. Over a three-and-one-half to four-year period, The ombuds began gaining the trust of the union, management, labor relations and employees. As more inquirers came to him, the time demands caused the job to grow into a full-time position.¹⁰⁵

2. Mission and Structure of the Ombuds Office

The mission of the office as stated in its brochure is to serve as a "neutral, impartial, and informal channel available to assist employees, managers and supervisors at all levels throughout the Broadcasting Bureau in resolving any work-related problem or issue that cannot be easily resolved through normal channels."¹⁰⁶ The ombuds, however, does not circumvent or replace established formal complaint, grievance, or appeal procedures. Moreover, according to its brochure, it does not circumvent or replace the functions of the Office of Civil Rights or the representational responsibilities of the employee unions.¹⁰⁷ In fact, the brochure specifically states that "[the] Ombudsman ensures that employees are fully aware of their rights in asking for the assistance and/or representation of those organizations in addressing and resolving problems."¹⁰⁸

The ombuds will encourage employees with problems to contact the appropriate offices and organizations, such as personnel, Office of Administration, civil rights and unions.¹⁰⁹ The ombuds does not act as an employee representative or employee advocate in formal hearings or

¹⁰⁵ *See id.*

¹⁰⁶ USIA INTERNATIONAL BROADCASTING BUREAU, THE USIA INTERNATIONAL BROADCASTING BUREAU OMBUDSMAN BROCHURE ¶ 1 [hereinafter USIA OMBUDS BROCHURE] (on file with author).

¹⁰⁷ *See id.* ¶ 8.

¹⁰⁸ *Id.*

¹⁰⁹ *See id.*

grievance procedures, although he will refer employees to the appropriate formal representational organizations.¹¹⁰ "Success" for the ombuds is not just resolution of matters but is also a response to problems in a way that leads to better and faster communications among adversaries. In addition, it functions as an effective "early warning system," keeping management out of trouble.

The ombuds position is still filled by Henry, although the scope of his responsibilities has expanded to include all of IBB, and he reports to the Director of IBB. He has no staff and does all his paperwork and administrative work himself.¹¹¹

3. *Basic Elements: Confidentiality and Neutrality*

Confidentiality is of utmost importance. The ombuds is a member of The Ombudsman Association and practices in accordance with its code of ethics. He guarantees absolute and total confidentiality to everyone with whom he talks in all cases, except in cases of threat to the organization, its employees or national security.¹¹² In developing his confidentiality policy, The ombuds did not seek approval from any other divisions or units in the agency.¹¹³ He has developed a relationship with the Inspector Generals Office whereby he will respond to requests for information only to the extent that he can provide information that is not confidential. He has never been subpoenaed to produce documents or testimony, but he has received two requests for records under the Freedom of Information Act (FOIA) that did not require disclosure of confidential information.¹¹⁴ He did breach a confidence once when he believed that an employee posed a threat to another's physical safety.¹¹⁵ The employee had previously made threats against individuals and had brought a weapon into the workplace. The ombuds relayed his concerns to the Director of Personnel who requested

¹¹⁰ See *id.* ¶ 10.

¹¹¹ See Interview with Robert Henry, *supra* note 38.

¹¹² See USIA OMBUDS BROCHURE, *supra* note 106, ¶ 4.

¹¹³ See Interview with Robert Henry, *supra* note 38.

¹¹⁴ See *id.*

¹¹⁵ Disclosure under these circumstances is consistent with The Ombudsman Association's Code of Ethics.

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the security division to investigate the matter. The investigation yielded information sufficient to dismiss the employee.¹¹⁶

The ombuds has focused on confidentiality in other ways as well. The ombuds office was recently moved from the VOA management wing because clients were uncomfortable meeting him there. Since the ombuds office has been moved, the number of inquirers has increased.¹¹⁷ The ombuds's answering machine is confidential and private, accessible only by him. With respect to record retention, the ombuds has a *pro forma* interview sheet that contains very basic information about an inquirer and his or her concerns. He keeps this sheet and other relevant documents for approximately one year.¹¹⁸ After that time, he discards all information that he deems confidential and retains the nonconfidential material indefinitely. In addition, prior to receiving documents from an inquirer, the ombuds will caution that, while he will try to protect the confidentiality of all documents, he cannot guarantee that they may not be produced pursuant to a FOIA request or subpoena.¹¹⁹

In one instance, The ombuds experienced a rather significant challenge from senior management to his neutrality. However, after seeking and obtaining the director's support, the matter was resolved to his satisfaction.¹²⁰ According to a union representative, the ombuds would be a "good poker player."¹²¹ He has a reputation for integrity and being able to maintain his neutrality in attempting to resolve workplace conflict and in participating in group task forces. This view was supported by the Deputy Director of the USIA Office of Civil Rights and the EAP Counselor.

On a daily basis, the ombuds reports that he spends approximately 80% of his time handling cases and calls that are person specific. In other words, these are matters in which only the individual initiating the matter is involved.¹²² Approximately 5% of the ombuds's time is spent focusing on systemic and policy change issues. He spends approximately 5% of his time on promoting and publicizing the ombuds program and in training.

¹¹⁶ See Interview with Robert Henry, *supra* note 38.

¹¹⁷ See *id.*

¹¹⁸ See *id.* The ombuds has not consulted with the Agency Records Officer with respect to the document retention and destruction schedule.

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ Telephone Interview with Marie Ciliberti, *supra* note 102.

¹²² See Interview with Robert Henry, *supra* note 38.

Approximately 10% of his time is spent participating in meetings and task forces that are not specifically related to any of the above.¹²³

4. *Is It Working?*

The current ombuds has not developed tools specifically for evaluation purposes. He believes the value of his office is underscored by several facts: first, he can cite to specific cases that he resolved and therefore did not go forward; second, he interacts with enough people to know that they feel positively about the program; and third, he continuously gets a high number of referrals.¹²⁴ Because he wants to ensure the continued existence of the ombuds's function in the agency, he is starting to generate periodic reports on a regular basis. He is also very conscientious about communicating information regarding trends or other matters where he has permission: in senior staff meetings, in his monthly meetings with the Bureau Director and in weekly meetings with the Director of Personnel. He prepares "ombudsman advisory notes" to senior management as needed, and he sporadically maintains statistics on cases and inquirers, generically without names. He receives approximately three to four new cases a week and four to five general inquiries a day that he can answer in one phone call. He also is involved in informal investigations that arise sporadically.¹²⁵

The ombuds believes that inquirers come to him because they have not been satisfied with other processes or because they do not trust the other processes. He believes that his source of power stems from his relationship to the Director. In addition, he has been a VOA/IBB employee so long that people frequently know and trust him, and are keenly aware that he is quite knowledgeable about the organization's functioning. His style is to try to empower the inquirer to resolve the problem him/herself. When the ombuds does become involved directly in problem resolution, he frequently consults back with the inquirer.¹²⁶

The ombuds's approach to an inquirer's concerns about reprisal is instructive of his various approaches. First, if the inquirer would like the ombuds to intervene in some way, but is uncomfortable with him using her

¹²³ *See id.*

¹²⁴ *See id.*

¹²⁵ *See id.*

¹²⁶ *See id.*

name, he will take steps to minimize the likelihood of reprisal. He will very informally contact others he knows in the same unit. If they have similar complaints, he will approach the supervisor saying that several people have indicated a concern. He then tries to understand the manager's perspective and work out the problem. If there already have been allegations of retaliation, he may speak with the manager directly and remind him that the ombuds's role is to attempt to resolve matters, and that the manager's actions are being viewed as harassment. If that is not successful, he may warn management that a manager's actions could make the situation worse, and that the actions need to stop. If the manager is not responsive, The ombuds will consult with the next level manager. From a systemic perspective, The ombuds could raise the issue, with the Director's support, at a senior staff meeting.¹²⁷

Comments of individuals from overlapping offices support the ombuds's view that his services are valued. The ombuds has spent a good deal of his time trying to work with other offices to gain acceptance for the program. For example, a member of a local union executive board views the ombuds office as an ally. Although, she stated candidly, it was a little bit like "two porcupines making love—you have to do it carefully."¹²⁸ From her perspective, the ombuds can assist the union in several ways. He has access to records not available to the union; he can carry the union's message to management in a less challenging manner; and he provides another alternative to resolving employees' concerns and another "pressure point" on management. It also gives her a "window into how hard management will fight on an issue."¹²⁹ As a pragmatist, she says she believes that resolving matters early on, with the ombuds's assistance, will decrease the likelihood of retaliation that "is not far behind once an employee files a formal grievance."¹³⁰ Conversely, the ombuds's relation to the union benefits management because the ombuds can more accurately serve as an early warning system to management when appropriate. The union official feels that, overall, the ombuds has had a positive impact on

¹²⁷ *See id.*

¹²⁸ Telephone Interview with Marie Ciliberti, *supra* note 102.

¹²⁹ *Id.*

¹³⁰ *Id.*

the ability of the union to function effectively because he could bring an employee's perspective to management without concerns about reprisal.¹³¹

The Office of Civil Rights similarly values the ombuds's function in the agency according to the Deputy Director of the USIA office, especially because the number of EEO complaints that the office processes from IBB is disproportionately high compared with the rest of the agency.¹³² The Deputy and the ombuds confer on specific issues, and the ombuds is a member of the EEO Advisory Board. In addition, they coordinate if an employee comes to one office and might benefit from speaking to the other. At times, they will work jointly on a matter. The EEO officer expects that the ombuds will generally refer EEO matters to her office. She acknowledges however, that if the employee chooses not to go to the EEO office, it is appropriate for the ombuds to attempt to resolve the matter. When she addresses employee and management groups, she even distributes the ombuds brochures. She stated that the EEO caseload would triple if it were not for the ombuds's assistance.¹³³

The EAP program representative, a psychologist who has been with USIA since 1981, spoke positively of the ombuds office, stating it was another outlet for employees to voice concerns.¹³⁴ In his view, while the offices had overlapping interests, the ombuds office has slightly different goals and is likely to be more influential with management than he would be. The two offices often refer to each other, depending on whether the

¹³¹ See *id.* While the union representative was very positive about the ombuds office, she believed that if the Labor Relations Office (LRO) were "doing its job," the ombuds office would not be necessary. In fact, she felt a well-functioning LRO would be preferable to an ombuds office because the LRO would have implementation and monitoring authority lacking in an ombuds. In addition, she felt the ombuds was not institutionalized. A new director might not support the position adequately, or a new ombuds might not be as careful and neutral. According to the union representative, the LRO is strongly pro-management and takes actions to develop a case against the employee. This is not only unfair to the employee, it also increases the likelihood of reprisal. She also expressed skepticism that the LRO could ever change adequately to serve its proper function. This view is consistent with a typical ombuds function in which the ombuds may substitute temporarily for parts of a dispute resolution system that are not functioning well. See Rowe, *supra* note 52, at 359.

¹³² See Interview with Delia Johnson, Deputy Director of the Office of Civil Rights (Mar. 11, 1996).

¹³³ See *id.*

¹³⁴ See Interview with Jim Wilcox, EAP Program Representative (Dec. 1995).

concern is more personal or more workplace based, or they may work as a team to try to resolve the problems.¹³⁵

C. Smithsonian Institution

1. Agency Description and Impetus to Create the Ombuds Office

The Smithsonian Institution, established in 1846 by an act of Congress, consists of an education and research complex of sixteen museums, galleries and a zoo. The Institution also has research facilities in eight states and the Republic of Panama. The Smithsonian is governed by the Secretary of the Smithsonian and a board of regents that is independent of the government. Seventy-seven percent of its funding is through an annual congressional appropriation. The Smithsonian has approximately 6700 permanent staff members. Approximately 2000 employees are trust-fund employees and the rest are federal employees.¹³⁶ The union American Federation of Government Employees (AFGE) represents federal bargaining unit employees within the Institution.

In 1977, senior management at the Smithsonian proposed creating an ombuds office because growth at the Institution had negatively impacted employee/management communication. In addition, various members of management were concerned that trust-fund employees did not have the legal protections enjoyed by the federal employees, potentially creating a two-tiered system. Moreover, there was concern that employees might have issues that did not fit into established forums for handling concerns. Creating an ombuds office, it was thought, could address all these issues. As envisioned by the Director of Personnel, who was active in the office's creation and design, the ombuds was to be a part-time position reporting to the Assistant Secretary for Administration. Initially, the strongest opposition came from the union, which was distrustful of management's purpose in establishing an ombuds office. The first ombuds was selected in 1977. The current ombuds, Chandra Heilman, was selected in 1983 and is a member of the Office of the Under Secretary. The equivalent of a GS-

¹³⁵ See *id.*

¹³⁶ See OFFICE OF PUBLIC AFFAIRS, SMITHSONIAN INSTITUTION FACT SHEET (1996).

13,¹³⁷ she works four days a week in a sunny office hidden away in a corner of the Arts and Industries Building. She has no staff and performs all administrative work herself.¹³⁸

2. Mission and Structure of the Ombuds Office

The Smithsonian ombuds is, according to its brochure, “a *neutral* party to whom employees can bring any work-related problem, concern or complaint that cannot be resolved through normal channels. The ombudsman will respect confidentiality when requested, will listen to the problem and discuss steps to take to help you reach a fair resolution.”¹³⁹

In addition, she participates in systems change, catalyzed by both her work with individuals and through her ad hoc discussions with other offices within the Smithsonian that address human resources issues, such as the Office of General Counsel, the EAP, the labor relations office and EEO. The ombuds’s definition of “success” is when she is aware that a situation has improved both in terms of system change and for a particular individual.¹⁴⁰

The ombuds handles a wide variety of cases throughout the country and in Panama¹⁴¹ but ensures that employees are aware of formal processes that exist within the agency. For example, if a bargaining unit employee solicits her assistance, she will, with that employee’s permission, notify the union as to her involvement. If the union prefers to handle the matter itself, she will back out unless the employee specifically requests that she continue to assist him. She handles matters that are arguably EEO related in the same manner. She will serve as an observer in a formal investigation, but she will not conduct the investigation herself or submit a written opinion.¹⁴²

¹³⁷ As of 1996, the salary of a full-time GS-13 in Washington is \$54,629 to \$71,017. See Federal Research Service, tbl. 1997 *General Schedule Pay Scale*, FED. CAREER OPPORTUNITIES, June 16-29, 1997, at 4.

¹³⁸ See Interview with Chandra Heilman, *supra* note 37.

¹³⁹ SMITHSONIAN INSTITUTION, THE OMBUDSMAN . . . A SOURCE FOR SOLVING YOUR PROBLEM ¶ 2 [hereinafter SMITHSONIAN OMBUDSMAN BROCHURE] (on file with author).

¹⁴⁰ See Interview with Chandra Heilman, *supra* note 37.

¹⁴¹ While she is authorized to address concerns of employees who are not based in Washington, D.C., most of these are handled through phone or fax rather than personal contact.

¹⁴² See Interview with Chandra Heilman, *supra* note 37.

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As stated in the Smithsonian ombuds brochure, the ombuds operates in several different ways: As a mediator, sounding board, neutral voice, impartial ear, confidential advisor and resource for assistance.¹⁴³ She finds that, over time, more and more managers are seeking her assistance and advice regarding problems dealing with their supervisees.¹⁴⁴

The ombuds has had access to information as she has needed it. She has regularly scheduled meetings with her supervisor who also apprises her outside of regularly scheduled meetings of significant events or trends when necessary. She also learns about trends and changes through her participation in agency task forces such as the Women's Council, the EEO Advisory Committee and the EAP Advisory Committee and, as discussed above, through ad hoc meetings with other individuals who have an interest in identification and resolution of workplace conflict. On a case-by-case basis, she has requested information she has deemed necessary and has not encountered any difficulties.¹⁴⁵

On a routine basis, the ombuds spends the vast majority of her time, approximately 75%, dealing with resolution of cases brought to her attention by individual employees, although she does engage in system change activity approximately 5% of her time. She spends less than 5% of her time promoting the ombuds program, speaking to new employee groups and other programs, and occasionally arranging for articles in newsletters. Unlike some federal workplace ombuds, she provides very little formal training to employees or managers. The remainder of her time, approximately 10-15% of her time, is spent participating in meetings, task forces and other activities that are not specifically related to any of the above.¹⁴⁶

The ombuds believes that the source of her power to resolve matters stems from her access to the Under Secretary and Secretary of the Institution, if needed. Moreover, her supervisor has a great deal of credibility within the Institution. Employees and managers seek her services because she can help them talk about their problem. They value another opinion from someone who is not involved in the dispute. She understands the work situation and provides them with a rational, non-judgmental

¹⁴³ See SMITHSONIAN OMBUDSMAN BROCHURE, *supra* note 139, ¶ 3.

¹⁴⁴ See Interview with Chandra Heilman, *supra* note 37.

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

voice.¹⁴⁷ Additionally, she believes she is not threatening to an employee or manager. She issues no reports, she causes few rifts and she is generally able to handle matters quickly and quietly. The functioning of the ombuds office allows employees and managers to deal with issues directly; no one beyond the parties needs to know what is happening. This may be why very few inquirers have returned to her complaining that supervisors have retaliated against them for having engaged the ombuds's services.¹⁴⁸

3. *Basic Elements: Confidentiality and Neutrality*

As with the other ombuds offices, The ombuds sees maintaining confidentiality as a vitally important aspect of her function. She practices according to The Ombudsman Association Code. She therefore maintains confidentiality of all information unless there could be physical harm to the inquirer or to others. If she perceives this to be the case, she will first encourage the inquirer to come forward him/herself and report or seek assistance, as appropriate. She has never broken a confidence because of concerns about safety.¹⁴⁹

Supporting her concerns about confidentiality is her confidential answering machine to which no one else has access and her locked office to which there are only three keys: one is the ombuds', one is under seal in the security office and one is in the secretary's safe.¹⁵⁰ She destroys her notes periodically, about twice a year, and only maintains select statistical information.¹⁵¹ She was subpoenaed to produce documents once, but, because she had no responsive documents, the subpoena was never enforced. She has never received a request under FOIA. Thus far, when the EEO office or the Inspector General has requested information, she disclosed information after obtaining authorization from the inquirer, or she has had no documents to produce. The Inspector General has respected her obligation to maintain confidentiality and has never forced her to breach it.¹⁵²

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*

¹⁴⁹ See *id.*

¹⁵⁰ See *id.*

¹⁵¹ See *id.*

¹⁵² See *id.*

The ombuds could report no instances during which she felt her neutrality was being seriously challenged by management.¹⁵³ Other Smithsonian offices interviewed for this Article supported the ombuds's consistent objectivity and neutrality. As the EAP Program Coordinator stated, "I've seen her stand up to anyone!"¹⁵⁴ However, one office mentioned that she is occasionally perceived by employees as part of management.

4. *Is It Working?*

Because the ombuds is quite confident of senior management's support of her office, she has not focused heavily on creating documents to justify it. She does maintain generic statistics on its inquirers including gender, grade level and whether the inquirer is a member of a minority group. She found that the inquirers were fairly equally distributed in terms of gender and grade level, and their racial and ethnic identities were consistent with the Smithsonian population. She receives approximately 220 to 250 cases a year. This number does not include contacts in which the ombuds can provide the service or information requested during that particular contact.¹⁵⁵

The office's success is confirmed by individuals in overlapping offices. Each of the offices was very complimentary about the work of the ombuds in general and the work of the current ombuds in particular. In fact, each office questioned whether the outstanding work that has been performed should be attributed to the role of the ombuds or whether it was a function of this ombuds's personality.¹⁵⁶

According to the Deputy General Counsel at the Smithsonian, over the years he has spoken with the ombuds on a sporadic basis when issues of joint concern have arisen, respecting any confidentiality constraints she may have.¹⁵⁷ In the past, the ombuds has called the Deputy General Counsel to brainstorm in general or to discuss a specific problem that

¹⁵³ *See id.*

¹⁵⁴ Telephone Interview with Dee Federick, EAP Program Coordinator (Dec. 19, 1995).

¹⁵⁵ *See* Interview with Chandra Heilman, *supra* note 37.

¹⁵⁶ *See, e.g.,* Telephone Interview with Jim Douglas, Smithsonian Deputy General Counsel (Feb. 1996).

¹⁵⁷ *See id.*

requires immediate attention such as an employee threatening violence. The Deputy General Counsel believes that the ombuds has made a significant contribution to the agency for several reasons. The ombuds is able to bring problems to a higher level of management than would normally become involved. This may increase the incidence of resolution, provides management with essential information that they may not have otherwise received and helps to make employees feel that their concerns are being taken seriously. The Deputy General Counsel also stated that the ombuds office may have reduced the number of certain complaints being funneled into the EEO Office.¹⁵⁸ Previously, workplace conflicts that were not EEO based were brought to the EEO Office because there were no other avenues for resolution. The ombuds office is able to address these concerns informally with a more agency-wide perspective. In general, the Deputy General Counsel concluded that the existence of the ombuds has reduced the number of cases that reached the General Counsel's Office.¹⁵⁹

The Compliance Program Manager at the Smithsonian EEO Office mentioned several ways in which the EEO Office and the ombuds office work together.¹⁶⁰ They may jointly—or in conjunction with other offices such as the EAP counselor, OGC, or personnel—send an unofficial paper to the Under Secretary reporting trends in workplace issues that they have identified.¹⁶¹ The EEO Office will also refer individuals to the ombuds office if the employee does not have an EEO-based complaint. The EEO officer underscored that, without the ombuds office, the EEO Office would likely have more complaints.¹⁶² Because of the ombuds office, it was more likely that the complaints that came into the EEO Office would have an EEO basis since those that were more management based could go to the ombuds for assistance in resolution. According to the Compliance Program Manager, if an inquirer solicited the ombuds's assistance with an EEO-related problem, she should refer the employee to the EEO Office. In the event the employee preferred that the ombuds attempt resolution, the ombuds should notify the EEO Office that she is handling an EEO matter, but not disclose any names unless the inquirer authorizes her to do so. She

¹⁵⁸ *See id.*

¹⁵⁹ *See id.*

¹⁶⁰ *See* Telephone Interview with Bob Osborne, Smithsonian Compliance Program Manager (Feb. 27, 1996).

¹⁶¹ *See id.*

¹⁶² *See id.*

should continue to keep the EEO Office apprised as to the progress of the matter.¹⁶³

The EAP Program Administrator at the Smithsonian stated that she referred individuals frequently to the ombuds.¹⁶⁴ In so doing, she might withdraw from the matter or, if appropriate, continue to see the client. Alternatively, with the client's permission, she might just confer with the ombuds. She saw the ombuds as a vital link among the union, EEO, EAP and labor relations.¹⁶⁵ One of the special benefits of the ombuds office was that "while an employee may not always be pleased with the outcome of their conflict, they always walk away with their dignity."¹⁶⁶ Overall, she felt the ombuds office made a beneficial contribution to the EAP program. Without the program, the EAP would have to "get into a broader range of issues; that would dilute the effectiveness of the EAP."¹⁶⁷

The Chief of Labor and Employee Relations stated that he and the ombuds occasionally conducted informal investigations and that they referred employees and managers to each other as appropriate.¹⁶⁸ If a manager sought assistance in how to take action against an employee, the labor relations office was the appropriate place to provide that information. If, however, the manager sought assistance in deciding how to deal with a problem employee, he said the ombuds office might be a more appropriate source of assistance. Because of the ombuds office, he believes that the labor relations office has had a slight reduction in its caseload.¹⁶⁹

D. The Department Of Energy

1. Agency Description and Impetus to Create the Ombuds Office

The United States Department of Energy evolved from the United States Atomic Energy Commission that was created in 1946 to direct the design, development and production of nuclear weapons. In 1977,

¹⁶³ *See id.*

¹⁶⁴ *See* Telephone Interview with Dee Federick, *supra* note 154.

¹⁶⁵ *See id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *See* Interview with Dolph Sand, Chief of Labor and Employee Relations (Dec. 1995).

¹⁶⁹ *See id.*

Congress created the Department of Energy as a cabinet level department. According to the Department's mission statement, the agency "provid[es] the technical information and the scientific and educational foundation for the technology, policy, and institutional leadership necessary to achieve efficiency in energy use, diversity in energy sources, a more productive and competitive economy, improved environmental quality, and a secure national defense."¹⁷⁰ It supports a workforce of approximately 30,000, many of whom are scientists and engineers located throughout the country. There is currently one union, the National Treasury Employees Union at headquarters in Washington, D.C. Over forty percent of the employees in the Washington office are members of the bargaining unit. Other unions exist in various field offices.

The Office of the Ombudsperson at the Department of Energy is the youngest of the five case studies in this Article, having opened in late 1993 at the recommendation of the Secretary of Energy. The Secretary established the office because the Department had a perceived history of secrecy, abuse¹⁷¹ and long-standing morale and other personnel problems.¹⁷² According to news reports, she believed it was a "dysfunctional department."¹⁷³ The ombuds interviewed was the first ombuds at the Department.

The office is still in its formative stage and is working to establish a good reputation, relationships and trust with other Department offices. When the office of the ombuds was established, the decision was solely made on the secretary level. The union at the Department was not consulted. Moreover, the secretary appointed an ombuds who was unknown to the union or the agency. Consequently, the union was initially concerned about the role of the ombuds and the potential of the office to undercut the authority of the union. Discord with the union interfered with the office's ability to function for almost four months. To address the union's concerns, the ombuds has carefully worked with the union.

¹⁷⁰ UNITED STATES DEPARTMENT OF ENERGY, FUELING A COMPETITIVE ECONOMY, STRATEGIC PLAN 2 (1994).

¹⁷¹ See Alan C. Miller, *O'Leary Calls for a Review of her Practices*, L.A. TIMES, Dec. 10, 1995, at A32.

¹⁷² See *O'Leary's Friend and Aide Repays \$21,200 in Expenses*, ROCKY MTN. NEWS, Jan. 14, 1996, at 6A. After conducting a complete investigation, the Department determined that the ombuds had acted appropriately and refunded her money.

¹⁷³ Alan C. Miller & Dwight Morris, *The Travels of Hazel O'Leary*, L.A. TIMES, Dec. 10, 1995, at A1.

Whenever a bargaining-unit employee seeks her assistance, she will refer the person to the union or encourage the person to seek clearance from the union for her to handle the matter.¹⁷⁴

In addition, some of the individuals interviewed for this Article perceived that the office was established without much publicity.¹⁷⁵ According to the interviewees, this resulted in confusion on the part of employees and management as to the ombuds's role and function. The lack of clarity also caused some managers to express discontent about the ombuds's "meddling."

The legal office also initially raised some concerns about the existence of the ombuds office, especially with respect to the potential for an employee seeking assistance from the ombuds to inadvertently miss time deadlines in the formal grievance, union and EEO procedures. The EEO Office, while generally supportive of the ombuds, was similarly concerned about employees waiving their rights under EEO law because they might inadvertently miss time deadlines. According to the ombuds, these concerns have been resolved.¹⁷⁶

2. Mission and Structure of the Ombuds Office

As stated in the ombuds office brochure, the function of the office is to: "provide an opportunity for employees and stakeholders to confer with a neutral designee to discuss concerns, recommendations, and complaints perceived to interfere with work, productivity or morale."¹⁷⁷

While the ombuds acknowledges the potential for engaging in systemic change, her initial work has been primarily on individual cases.¹⁷⁸ She

¹⁷⁴ See Telephone Interview with Shirley Thomas, Department of Energy Ombuds (1996).

¹⁷⁵ According to the ombuds, however, the Ombuds Office was announced in a variety of employee communications with wide distribution. See *id.*

¹⁷⁶ See *id.*

¹⁷⁷ DEPARTMENT OF ENERGY, OFFICE OF THE OMBUDSPERSON ¶ 1 [hereinafter DEPARTMENT OF ENERGY OMBUDSMAN BROCHURE] (on file with author).

¹⁷⁸ In a more recent conversation with the ombuds, six months after the first, she related several efforts that she has begun in the area of systemic change. She has brought the matter to the Secretary's attention and requested that a committee be formed to review the matter and make recommendations. A committee has since been formed to address the issue. See Second Telephone Interview with Shirley Thomas, Department of Energy Ombuds (1996).

believes that, in its initial stages, a successful ombuds office should be able to provide quick, immediate service that underscores fairness. Although most of her inquirers are from the headquarters office, the departmental ombuds is available to all employees and managers to handle all different forms of conflict. The ombuds, however, will not handle cases that have been lodged as formal complaints, appeals, or grievances or those that are in litigation. Also, as stated above, she will exercise great sensitivity in dealing with bargaining unit employees who seek her assistance.¹⁷⁹

The current ombuds is a long time acquaintance of and reports directly to the Secretary of Energy who hired her from outside the agency where she served as a school social worker. She is the sole ombuds in the agency with access to clerical assistance as needed.¹⁸⁰ She has a very good working relationship with the Secretary, which, while an apparent benefit, has recently raised some questions in the press.¹⁸¹

Interviewees perceived that the ombuds is able to obtain more information directly from senior management than she might have otherwise. She also is perceived to carry authority even though she has no formal decision-making authority. Her access to information comes from participating in weekly senior staff meetings and committee meetings, having access to certain types of correspondence and, on occasion, walking the halls and making herself available in the lunchroom. She has access to any unclassified document in the agency, but she has not requested many to date.¹⁸²

As stated in the brochure, the ombuds utilizes different methods in attempting to address employee concerns: exploring alternative approaches to achieve positive resolution; acting as a mediator in the resolution process; and exploring other internal operations which may impact positive

¹⁷⁹ See Telephone Interview with Shirley Thomas, *supra* note 174.

¹⁸⁰ There are other individuals throughout the agency, exclusively in the regions, who participate in an "employee concerns program" (ECP) on a collateral duty basis. The regional collateral duty ECPs are authorized to listen to any type of problem and try to resolve it early on in a dispute. They are, however, required to maintain records of their conversations and dispute resolution efforts. There is no relationship between the Department Ombuds and the regional ECUs.

¹⁸¹ From 1995 through 1996, the ombuds's friendship with the Secretary has been frequently noted with disfavor in the national press as part of the GAO and Congressional review of the Secretary's conduct since being confirmed to her post at the Department. See, e.g., *supra* notes 171-173 and accompanying text.

¹⁸² See Telephone Interview with Shirley Thomas, *supra* note 174.

resolution.¹⁸³ In the event an employee decides to use a formal process, the ombuds will cease her involvement in the matter. According to the ombuds, Department employees seek her services because she can offer confidentiality. This is the first time the Department has ever provided such a service, and she believes employees appreciate being in an environment where they can differ, question and explore their feelings. She is unaware of anyone claiming that they have been retaliated against for coming to speak with her.¹⁸⁴

3. *Basic Elements: Confidentiality and Neutrality*

The Department ombuds practices in accord with The Ombudsman Association Code. Accordingly, she would disclose information communicated in confidence only if someone were threatening injury to themselves, another person or property.¹⁸⁵ To date, she has never had to breach a confidence and has not had any legal challenges to her confidentiality.¹⁸⁶ The location of her office currently does not provide the necessary confidentiality/anonymity to inquirers. However, upon inquirer's request, the ombuds will arrange meetings away from the office to ensure anonymity. She disposes of personal notes as soon as the matter is resolved and she does not maintain generic statistics at this point.¹⁸⁷ She articulated concerns that instituting a tracking system, even one that does not include names, could generate retaliation because managers might possibly be able to identify individuals.¹⁸⁸

In terms of any challenges to her neutrality, the ombuds stated that she is in a unique position in that she is on sabbatical from her job in another

¹⁸³ See DEPARTMENT OF ENERGY OMBUDSMAN BROCHURE, *supra* note 177, ¶ 5.

¹⁸⁴ See Telephone Interview with Shirley Thomas, *supra* note 174.

¹⁸⁵ See generally OMBUDSMAN HANDBOOK, *supra* note 1.

¹⁸⁶ See Telephone Interview with Shirley Thomas, *supra* note 174. She did have a discussion with the legal department about the appropriateness of her being a member of The Ombudsman Association Board of Directors, including her ability to practice to the TOA Code of Ethics. Apparently, she allayed their concerns after explaining her role and the role of the Ombuds within the agency.

¹⁸⁷ See *id.* The agency has determined that her personal notes are not official records.

¹⁸⁸ See *id.*

state and is more immune to pressure than she might be if this ombuds position were her sole option.¹⁸⁹

4. *Is It Working?*

At this point, the ombuds has not yet begun routinely maintaining statistics on inquirers, the complaints that they bring forward or drafting reports. She does not feel the need to generate any formal records or reports on the functioning of the office. She is confident of the Secretary's support and keeps her abreast of relevant information as necessary while maintaining the inquirer's confidentiality.¹⁹⁰ Further, she believes that the benefits of an ombuds office are not reflected in mere statistics, and that numbers and cost analyses do not convey the real benefits to the organization. For example, she believes that just the continued existence of the office is therapeutic to the organization, sending a caring message. Handling cases in a timely "win-win" manner is also relatively new and positive for the agency.¹⁹¹

With respect to her interactions with other offices within the agency, the Director of the Office of Dispute Resolution, the local union president and the Acting Deputy Director for Civil Rights and Diversity (EEO Officer) were interviewed. When the ombuds position was initially established, the EEO Officer was concerned that inquirers at the ombuds office might miss EEO time deadlines.¹⁹² After working with the office, he now believes that the ombuds office serves an important purpose of resolving conflict at the earliest stage. He was also supportive in that, prior to establishing the ombuds office, many cases that the EEO Office spent resources processing did not really belong in its office because it did not present claims cognizable under EEO law.¹⁹³ These employees entered the EEO process because there were no other alternatives in the agency to attempt to address and resolve their concerns. Since it was established, the ombuds office has been able to handle and resolve many of these cases.

¹⁸⁹ *See id.*

¹⁹⁰ *See id.*

¹⁹¹ *See id.*

¹⁹² *See* Interview with Willie Garrett, Deputy Director for Civil Rights and Diversity (Dec. 1995).

¹⁹³ *See id.*

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The EEO Officer also saw a benefit in the ombuds's ability to act as a "Department Traffic Cop," helping employees to identify the proper forum for resolving conflict.¹⁹⁴ He did express concern that, because of the newness of the office, employees lacked clarity as to the role and functions of the office and how its services differed from those of other dispute resolution offices. He is pleased with the relationship between him and the ombuds. They jointly discuss workplace problems where appropriate and consult with each other as needed. They may discuss someone in the complaint process provided that they can do so without breaching confidentiality.

The Director of the Office of Dispute Resolution was also supportive of the program. She believed that providing employees an opportunity to vent or to try to resolve problems in a confidential arena was an important agency resource.¹⁹⁵ She also noted that the ombuds benefits the ADR Program because she is able to deal with individual concerns that otherwise would go to the Office of Dispute Resolution, inappropriately requiring an allocation of substantial resources.¹⁹⁶ Additionally, she viewed the ombuds office as a potential source of referrals for the Dispute Resolution Office.¹⁹⁷ She did note, however, that, in retrospect, the experiences of the DOE Ombuds Office underscored the importance of including in an ombuds system design discussions with the union, adequate publicity and clarification and understanding of the role and function of the ombuds.¹⁹⁸

The President of the Washington Chapter of the National Treasury Employees Union (NTEU) stated that, sometime prior to the establishment of the ombuds office, the union had recommended the establishment of such an office because it believed that energy employees who were not members of a bargaining unit did not have adequate channels of redress.¹⁹⁹ In addition, employees expressed concerns in areas where the union did not have jurisdiction. However, the union was initially perturbed when the office was established without involving them in the design process. Moreover, they were concerned that the Secretary filled the position with

¹⁹⁴ *Id.*

¹⁹⁵ See Telephone Interview with Phyllis Hanfling, Director of the Office of Dispute Resolution (Jan. 1996).

¹⁹⁶ See *id.*

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*

¹⁹⁹ See Interview with Ellis Maupin, President of Chapter 213 of the Washington Chapter of the National Treasury Employees Union, in Washington, D.C. (Apr. 1996).

someone the union did not know. In the beginning, because of her lack of familiarity with the union and governmental processes, the current ombuds attempted resolution of matters that the union believed were more appropriately handled by the union. The union considered charging the Agency with engaging in unfair labor practices.²⁰⁰

To everyone's credit, the ombuds and the union president began communicating their concerns about conflicting rights and jurisdiction. Based on his discussions with the ombuds, the union president persuaded the union not to go forward with its legal actions. He is currently pleased with their interactions: after all, "[t]here is no shortage of business." They do not always agree, but he "has nothing but respect for [the ombuds] as a person and a professional."²⁰¹ The ombuds has been very careful to ask for union advice on handling a matter while maintaining confidentiality and will refer matters to him when appropriate. They will sometimes jointly attempt to resolve a matter. The union president believes that, overall, the ombuds has made a positive contribution to the agency.²⁰² He knows from personal experience that some individuals who had previously felt disenfranchised now believe they have a place where someone will listen to their concerns, whether or not their problems are resolved.²⁰³ The office has also benefited the union in that previously, employees would seek assistance from the union for matters that were not within the union's jurisdiction. The union now has some place else to send them. If he were able to make changes in the ombuds office, the union president would like the ombuds to have power to enforce changes rather than just recommend actions.

E. Department Of State

1. Agency Description and Impetus to Create the Ombuds Office

The Department of State, another cabinet-level agency, is the oldest of the agencies studied, having been established in 1789.²⁰⁴ As the country's lead foreign affairs agency, the Department formulates, represents and

²⁰⁰ *See id.*

²⁰¹ *Id.*

²⁰² *See id.*

²⁰³ *See id.*

²⁰⁴ *See* OFFICE OF FED. REG., THE UNITED STATES GOVERNMENT MANUAL (1995).

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implements the President's foreign policies. In addition, several related foreign affairs agencies, including USIA, are under the general direction and overall foreign policy guidance of the Secretary of State. It carries out its mission through 250 diplomatic and consular overseas posts, its Washington, D.C. headquarters and other offices in the U.S.²⁰⁵ Its 15,500 employees are divided into approximately forty percent career civil service and sixty percent foreign service personnel.²⁰⁶ Within the Department, there are three unions: the American Foreign Service Association (AFSA), established in 1924 as a professional association and as a union in 1973 representing 7900 bargaining unit foreign service personnel;²⁰⁷ the National Federation of Federal Employees (NFFE), elected in 1985 and representing approximately 640 employees; and the American Federation of Government Employees (AFGE), elected recently in July 1995 and representing approximately 3000 bargaining unit employees.²⁰⁸

In a manner distinctive among federal workplace ombuds, the ombuds at the Department of State was established by the Foreign Relations Authorization Act in 1987.²⁰⁹ At the time, Congress was concerned about the growing inequality among two classes of employees at the Department: the foreign service employees who received more favorable opportunities and promotions, and the civil service. Congress established the ombudsman position based on its findings that:

(1) the effectiveness and efficiency of the Department of State is dependent not only on the contribution of Foreign Service employees but equally on the contribution of the 42 percent of the Department employees who are employed under the Civil Service personnel system;

²⁰⁵ See U.S. DEP'T OF SR. BUREAU OF AFF., THE U.S. DEPARTMENT OF STATE: STRUCTURE AND ORGANIZATION (1995).

²⁰⁶ See Telephone Interview with Rita Glover, United States Department of State (Mar. 19, 1996).

²⁰⁷ See Telephone Interview, Director of Membership, American Foreign Service Association (Mar. 22, 1996).

²⁰⁸ See Telephone Interview, Labor Management Negotiator, United States Department of State (July 15, 1996). This figure includes approximately 300 bargaining unit employees who gained recognition prior to 1995. *See id.*

²⁰⁹ See Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 172(c), 101 Stat. 1331, 1359 (codified as amended at 22 U.S.C. § 2664(a) (1994)).

(2) the contribution of these Department's Civil Service employees has been overlooked in the management of the Department, and greater equality of promotion, training, and career enhancement opportunities should be accorded to the Civil Service employees of the Department; and

(3) the goal of the Foreign Service Act of 1980 was to strengthen the contribution made by Civil Service employees of the Department of State by creating a cadre of experienced specialists and managers in the department to provide essential continuity.²¹⁰

These concerns about the inequality of treatment of Department civil service employees were especially heightened because the Department was facing severe budget cuts.²¹¹ To underscore these concerns, Congress directed the Secretary to "take all appropriate steps to assure that the burden of cuts in the budget for the Department is not imposed disproportionately or inequitably on its Civil Service employees."²¹²

Accordingly, the legislation established, in the Office of the Secretary of State, the position of Ombudsman for Civil Service Employees, and required that it be a career reserved position with the Senior Executive Service (SES).²¹³ The ombuds is also required to report directly to the Secretary of State and has the right "to participate in all Management Council meetings to assure that the ability of the Civil Service employees to contribute to the achievement of the Department's mandated responsibilities and the career interests of those employees are adequately represented"²¹⁴

²¹⁰ 22 U.S.C. § 2664(a) (1994).

²¹¹ See Catherine Brown, Report on the Civil Service (Mar. 8, 1995) (on file with author) [hereinafter Department of State Ombuds Report].

²¹² Foreign Relations Act, Fiscal Years 1988 and 1989 § 172.

²¹³ A position in the SES is any position in a federal agency which is classified above GS-15 that is not required to be filled by an appointment by the President and in which an employee has certain supervisory responsibilities. By definition, it excludes any foreign service position. See 5 U.S.C. § 3132(a)(2) (1994). The pay range as of 1996 for an SES in the Washington, D.C. area is \$100,526 to \$122,688. See Department of State Ombuds Report, *supra* note 211.

²¹⁴ Foreign Relations Act, Fiscal Years 1988 and 1989 § 172. According to the ombuds report, the Management Council no longer exists. However, the ombuds seeks other vehicles through which to fulfill her statutory objectives. See Department of State Ombuds Report, *supra* note 211.

2. Mission and Structure of the Ombuds Office

The mission and philosophy of the office embraces these tenets: ensuring that civil service concerns are identified and properly weighed by decision-makers; helping civil service employees and their supervisors, whether civil service or foreign service, to assume primary responsibility for promoting individual career mobility and advancement; maintaining an open door policy; providing honest and straightforward answers to employee questions about career opportunities, training and other personnel matters; and protecting the confidentiality of employees and supervisors who seek the ombuds's counsel. The ombuds's "mandate" is to advise the Secretary and senior Department management on civil service issues and to represent the career interests of civil service employees.

According to the former ombuds, "success" for the office occurs when mainstream management and personnel bureaus do a good enough job that her function is unnecessary.²¹⁵ She stressed that the ombuds at the department is a voice for a clearly defined constituency but without operational responsibilities.²¹⁶ She also noted that, unlike most workplace ombuds, she is considered a part of management. The focus of her job is the "big picture."²¹⁷ On the average, the ombuds and her special assistant spent the lion's share of their time, approximately 70%, focusing on systemic issues and policy change. Approximately 20% is spent handling cases that are specific to one individual. The remaining 10% is spent promoting and publicizing the ombuds program and training employees.²¹⁸ They focus on the big picture by serving as senior advisor to the Secretary and senior Department management on matters pertaining to the utilization of the civil service workforce, conducting evaluations and analyses of matters relevant to the promotion of the civil service workforce,

²¹⁵ See Interview with Catherine Brown, Department of State Ombuds (Nov. 29, 1995).

²¹⁶ See *id.*

²¹⁷ *Id.* She acknowledged that, under certain circumstances, her dual roles could create a conflict of interest situation because, as the Assistant Legal Advisor for Consular Affairs, she supervises employees and provides legal advice to others who may also need ombuds's services. However, she was unaware of any specific problems her two hats had created; previous ombuds were in similar situations and had not reported any problems, and, in the event of a conflict, the special assistant would be available to handle the matter. See *id.*

²¹⁸ See *id.*

maintaining an awareness of matters of concern to civil service employees by consulting with employee representatives and maintaining an open door for expression of ideas and reporting to the Secretary on activities having a significant impact on civil service employment.²¹⁹

The ombuds is available for most workplace issues, although the majority of the issues focus on career enhancement for civil service employees. Most inquiries outside of Washington, D.C. are addressed through nonclassified e-mail or on the telephone. The ombuds will not supplant other existing offices or functions such as EEO, grievance, or the newly elected union. The office will rarely become directly involved in resolution of the problem. It will, however, brainstorm with individuals regarding these and other options. Because the civil service union was elected less than one year ago, the ombuds's office is particularly sensitive about assisting bargaining-unit inquirers.²²⁰

Notwithstanding the legislative mandate, the first ombuds was not selected until November 1989. Since inception, the ombuds has been a career SES member, generally serving in a collateral-duty capacity for roughly two years, with the assistance of a full-time special assistant, a GS-14 career civil service employee. The current ombuds, an SES in the Office of the Legal Advisor, is the third to serve. Her term began in November 1993. She estimates that, on the average, she spends less than twenty hours a week on her ombuds-related responsibilities. Her special assistant, with almost twenty years experience in the Department, has served in this capacity since the inception of the ombuds program.²²¹

Because the ombuds is a collateral-duty position, the ombuds is theoretically available for counseling individual employees, but the bulk of the contacts come through the special assistant. She will solicit the ombuds's help in the "sticky" cases: the ones in which the agency was "not doing things right."²²² The ombuds focuses more on systemic change issues, participating in committees, task forces and writing related reports. The ombuds receives relevant information both from employees and management in connection with her ombuds role and in connection with her senior legal position in the agency. She participates in senior staff meetings and strategic management initiative meetings; she attends certain personnel-

²¹⁹ *See id.*

²²⁰ *See id.*

²²¹ *See id.*

²²² *Id.*

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related meetings and chairs the Civil Service Advisory Committee. Neither she nor her assistant have requested individual personnel or similar records because inquirers typically bring all relevant documents to the office themselves.²²³

In general, the ombuds and her special assistant believe that each employee, not the ombuds office, is responsible for the development of her career. Nor does the ombuds office generally act as advocates for any particular individual. Accordingly, the special assistant will help inquirers explore options and will perform some research where necessary. She may also help to cut through bureaucratic red tape. However, she will rarely become involved as an intermediary to try to resolve the matters brought to her.²²⁴

3. Basic Elements: Confidentiality and Neutrality

Confidentiality is essential to the working of the office. The only time that the ombuds or special assistant will breach confidentiality is in the event of danger to self or property, or major fraud. They have never disclosed information without authorization from the inquirer.²²⁵ The office has a combination lock known only to the ombuds, the special assistant and the executive office. There is a confidential answering machine and any sensitive matters are routinely locked in a safe in the ombuds's office where documents are not retrievable by name. When a case is completed, documents are returned to their owner or destroyed and a periodic review and destruction occurs at least once a year. The only documents that are retained are those alleging systemic problems or extraordinarily egregious misconduct that might have systemic implications. There is no clerical support to the office.²²⁶

The office has had several tests of its policy of confidentiality from both the grievance and EEO programs. In each instance, the inquirer was the individual requesting information. Accordingly, the office was able to disclose the information and documents with the clear authorization from the inquirer and without disclosing information regarding other people.

²²³ *See id.*

²²⁴ *See id.*

²²⁵ *See id.*

²²⁶ *See id.* The ombuds office has not consulted with the Agency Records Officer regarding record retention.

They have discussed potential disclosure issues and possible defenses to any document or information request with the legal department.²²⁷

4. *Is It Working?*

The ombuds's position description requires her to submit an annual report to the Secretary on "all activities which have had a significant impact on civil service employment."²²⁸ The annual report should also include recommendations for activities which serve as goals and objectives the following year. The annual report submitted by the current ombuds was described by one interviewee as "gutsy."²²⁹ In the thirty-page single-spaced report, with an additional ten pages of related statistics, the ombuds analyzed the current status of the civil service workforce in the Department and made several recommendations designed to improve the current situation.²³⁰ Within each she offered concrete suggestions as to how to achieve the recommended actions.

The office does not maintain statistics with respect to its handling of addressing the concerns of individual civil service inquirers. However, the special assistant estimated that she speaks primarily with high-level support staff and mid-level professionals and that she sees more female than male inquirers. On the average, she sees three to five cases and fields about twenty calls a week.²³¹ Recently, some agency managers have been questioning whether the ombuds's office is still necessary given the recent union election. The ombuds office and union are in transition, still exploring roles and how they might work together. It is clear, however, at

²²⁷ *See id.*

²²⁸ *Id.*

²²⁹ Department of Energy Ombuds Report, *supra* note 211.

²³⁰ *See id.* The primary recommendations included focusing on the need to ensure greater utilization of career civil service employees in leadership positions; to protect SES opportunities for the career civil service; to ensure greater job rotation of the civil service to deepen its skills and increase its versatility; to improve the human resource management and other skills of both the foreign and the civil service; to move ahead with information management initiatives that will permit informed and effective human resource management by the Department as part of an overall strategic planning effort; and to protect civil service career interests and to address human concerns in any plans to restructure or downsize the Department. *See id.*

²³¹ *See* Interview with Rosalie Dangelo, Special Assistant to the Ombuds (Nov. 29, 1995).

the very least, that the ombuds has a function of working with civil service management to maximize career growth and development, not duplicated by the union. The ombuds's and union's perspectives differ as do some of their goals. In addition, the ombuds can offer informality and confidentiality not generally available in a union setting. Clarification, however, is not likely to occur overnight.

According to the special assistant, individuals solicit the ombuds's assistance for several reasons: the office will maintain confidentiality; the inquirers are often able to obtain answers they are unable to obtain elsewhere; the inquirers can gain clarity on issues of employee/management rights; and the inquirers will receive creative, knowledgeable assistance in brainstorming options.²³² Moreover, they are able to ask for help without fear of reprisal.²³³ While the ombuds has experienced a few managers who prefer that employees not go outside line management with problems, there has been a low incidence of reprisal. The special assistant thought that the low incident of reprisal might be a result of their program marketing that stresses confidentiality and concerns about employee welfare.²³⁴ In those rare instances where she has encountered allegations of retaliation from an inquirer, she has not taken any direct action. Rather, she has supported the employee's efforts and worked with him or her to make their interactions less visible, such as meeting in a location that will ensure the inquirer's anonymity. In addition, she or the ombuds may work indirectly to educate supervisors to view positively the ombuds's role.²³⁵

Management solicits the ombuds's assistance to learn about employees' concerns and to gauge how employees will react to anticipated events. Managers may also call for advice with respect to a particular situation.

For this Article, members of other offices with overlapping responsibilities were interviewed, including the Associate Director for EEO and Civil Rights, an employment-counselor from the career-development resource center, and the Director of Grievance Bureau of Personnel. Each strongly supported the ombuds office and the particular individuals

²³² *See id.*

²³³ *See id.*

²³⁴ *See id.*

²³⁵ *See id.*

currently staffing it.²³⁶ The Associate Director for EEO and Civil Rights strongly believed that the ombuds office benefited the EEO Office because it could address matters that the latter had difficulty addressing.²³⁷ As in other agencies, the ombuds office provides an avenue for employees to seek assistance for non-EEO matters. Prior to establishing the ombuds office, the EEO Office handled those matters, expending valuable resources that should have been spent processing EEO-related concerns. The EEO officer recognized that the structure of having a collateral duty "SES'er" in the ombuds's position could theoretically create a conflict of interest situation, but he expressed support for the current ombuds's ability to handle the situation appropriately. He thought the ombuds was an effective voice to senior management, acting like a "conscience."²³⁸ He was content with the nature of interaction between the EEO and ombuds offices although he expressed an interest in developing a greater exchange of information regarding such issues as "hot spots" and repetitive problems.²³⁹ He had no objections to the ombuds office attempting resolution of an EEO-related case as long as the employee chose that option and was aware of EEO timelines and consequences for failing to meet those deadlines. In addition, he and the ombuds jointly sit on several task forces and occasionally discuss areas of overlapping interests.²⁴⁰

The Director of Administrative Grievance acknowledged that she had not had extensive interactions with the ombuds because the majority of her work dealt with foreign service grievances.²⁴¹ She estimated that, prior to the union election, only twelve to fifteen percent of her cases came from civil service employees.²⁴² With the advent of the union, she estimates a further decrease in civil service complaints.²⁴³ With respect to certain of the civil service complaints, she said there has been some consultation,

²³⁶ See Interview with Thomas Jefferson, EEO Associate Director, in Washington, D.C. (Dec. 11, 1995); Telephone Interview with Tanya Bodson, employment counselor (Dec. 13, 1995); Telephone Interview with Joann Leshman, Director of Administrative Grievance (Feb. 21, 1996).

²³⁷ See Interview with Thomas Jefferson, *supra* note 236.

²³⁸ *Id.*

²³⁹ See *id.*

²⁴⁰ See *id.*

²⁴¹ See Telephone Interview with Joanne Leshman, *supra* note 236.

²⁴² See *id.*

²⁴³ See *id.*

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especially if the ombuds had been previously involved in the matter.²⁴⁴ She has received some referrals from the ombuds office and believes that the ombuds office may have helped to resolve certain matters that otherwise would have come to her office.²⁴⁵ In the future, with significant agency redesigning, she anticipates she may have more involvement with the ombuds office, especially in “big picture” areas in which the ombuds’s perspective may be helpful to ensure fairness, to put forward concrete recommendations for management improvements and to increase communication between management and civil service employees.²⁴⁶

A professional career counselor at the Department’s Employee Counseling Office was also interviewed for this Article. She strongly supported the creation of the Department ombuds office because civil service had no access to individuals to help in career development.²⁴⁷ There have been referrals between the two offices. She refers to the ombuds if she believes there is a problem with personnel or a supervisor, or if it appears that a civil service employee’s rights are being violated. The special assistant has referred employees for counseling if she believes that the individual would benefit from “stepping back and looking at their career options.” The offices also co-sponsored some workshops and hope to develop more.²⁴⁸

Perhaps the best ombuds program evaluation, however, comes from one of the interviewees who spontaneously offered that the agency was “very lucky” to have the ombuds and her special assistant.²⁴⁹

V. ESTABLISHING A FEDERAL WORKPLACE OMBUDS OFFICE

A. *Benefits of an Ombuds to a Federal Agency*

The interviewees for this Article consistently pointed to several key benefits of an ombuds office within a federal agency. Perhaps the most consistent benefit addresses difficulties that appear to be uniformly experienced in agency EEO Offices. Without an ombuds, most agencies do

²⁴⁴ See *id.*

²⁴⁵ See *id.*

²⁴⁶ See *id.*

²⁴⁷ See Telephone Interview with Tanya Bodson, *supra* note 236.

²⁴⁸ See *id.*

²⁴⁹ See *id.*

not provide mechanisms for employees to resolve workplace disputes short of initiating a formal action. In a nonunion agency, the only two options are the administrative grievance process or the EEO Office. Interviewees frequently mentioned that employees are reluctant to use the administrative grievance program because federal personnel offices are so often identified with management interests. In an agency with a union, bargaining unit employees have a third option, but not all unions provide informal resolution options or have the authority to address all possible concerns. Therefore, EEO Offices are faced with numerous employees with bona fide workplace problems which are not EEO-based claims. Yet such employees are forced to seek resolution assistance from EEO Offices. These employees contort their facts to fit the EEO mold, or simply acknowledge their difficulties and plead for help because "they have no place else to go."²⁵⁰ In addressing these employees' concerns, the agency EEO Office utilizes valuable resources, delaying the time within which complaints with colorable EEO concerns are processed and possibly negatively impacting on the office's credibility within the agency.

Interviewees in other offices with overlapping responsibilities similarly expressed support for the agency ombuds office. In some instances, they believed that it beneficially reduced their caseload. In other instances, they strongly appreciated the collegiality of someone with whom they could brainstorm about specific workplace issues. Still in other instances, they believed that it augmented their function by providing a link with senior management that they would not have otherwise enjoyed.

Ombuds and other interviewees also consistently expressed their belief that the mere establishment of an ombuds office was a strong signal to employees that management cared about resolution of their problems.²⁵¹ Finally, interviewees stressed the importance of providing an office where employees could seek assistance *in confidence*. Concerns about retaliation appear to be fairly prevalent among federal sector employees. For example, for fiscal year 1996, reprisal was the most frequently alleged basis for discrimination in a federal EEO complaint, as 19.7% of all bases so alleged.²⁵² Even so, only one of the five ombuds reported experiencing

²⁵⁰ This is not in any way intended to suggest that all EEO cases fall into this non-EEO category.

²⁵¹ Because no employees, *qua* employees, were interviewed for this Article, there is no confirmation of the accuracy of this statement.

²⁵² See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 1996 EEOC FED. SECTOR REP. ON EEO COMPLAINTS & APPEALS, BY FED. AGENCIES FOR FISCAL YEAR

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instances in which inquirers presented allegations of retaliation for having consulted with the ombuds.

Although these were the primary, consistently cited benefits, interviewees cited other benefits as well, many of them focusing on the ombuds's ability to serve as a management feedback mechanism—an early warning system—to make management's job easier. For example, one ombuds related a story in which he became aware that several employees from one division began appearing at his doorstep, one at a time. He was surprised because that division had previously not experienced many workplace problems. Each employee's productivity was decreasing, and the office was experiencing a variety of problems from failure to meet time and attendance requirements to poor performance. The ombuds, because of his familiarity with many of the inquirers, began spending time walking the corridors within the division. Within a short time, he heard a rumor that the agency planned to announce layoffs imminently and that the division was going to be the first and hardest hit. Because of his access to senior level management, the ombuds was able to confirm that no layoffs were planned for the immediate future and that the division was certainly not on the "hit list." He communicated this information to the senior management within the division and recommended that they address the employee's layoff concerns directly in staff meetings. This was done, and the tide of employees to the ombuds's office receded.²⁵³

Several interviewees also noted the value of the ombuds's ability and interest in functioning as a systemic change agent. Among those agencies in which representatives from different offices met and discussed trends in the workplace, interviewees were appreciative of the ombuds's availability, perspectives and access to senior management. One ombuds related several instances related to his role as a systemic change agent regarding the agency's employee rating system. He began noting that dozens of employees were complaining that they were surprised by the ratings in their annual evaluations. After informally investigating, he learned that, in general, agency management did not conduct mid-year evaluations with their supervisees. The ombuds drafted an advisory memo to senior managers alerting them to his findings and recommending that mid-year evaluations be required. The Director of Personnel monitored his recommendation and required managers to perform mid-year evaluations.

1996 24 (1996). As of the date of publication, the 1997 statistics were unavailable from the EEOC.

²⁵³ See Interview with James Lucey, former Secret Service ombuds (1995).

The ombuds also plans to monitor the complaints he receives during the next cycle of evaluations to determine whether the new practices actually impact the types of complaints he receives.²⁵⁴

The ombuds also noted that many of the inquirers were complaining that they were unfairly rated. On review, he realized that one particular factor, "team effort," was the area where these complainants were penalized.²⁵⁵ His informal research suggested that the "team effort" factor had been cast into a "praise-the-boss" criteria.²⁵⁶ He therefore is recommending that, although the factor was included for legitimate purposes, it be removed or altered to minimize its abuse.²⁵⁷

Thus, an agency or division would most benefit from establishing an office of the ombuds under the following circumstances:

1. If an agency EEO office is beleaguered with complainants who are not presenting arguable EEO matters, and this is deleteriously affecting the office's ability to function, either because of insufficient resources or reduced credibility, an ombuds may be able to handle some of the complainants;

2. If an EAP office is receiving workplace complaints that are outside the EAP office's mandate, an ombuds might be beneficial;

3. If the current agency dispute resolution offices are not adequately addressing workplace-related concerns, an ombuds may be able to increase efficiency by unofficially coordinating efforts between and among offices, in addition to being an alternative resource for airing and resolving workplace concerns;²⁵⁸

4. If employee morale is low, establishing an ombuds office might be perceived as an indicator of management concern about employees' welfare;

²⁵⁴ See Interview with Robert Henry, *supra* note 38.

²⁵⁵ See *id.*

²⁵⁶ See *id.*

²⁵⁷ See *id.*

²⁵⁸ Especially as workplace diversity grows and individual values differ, having alternative choices and options for complainants to express concerns or pursue grievances in the workplace will be especially important. See generally Mary P. Rowe, *Options and Choice for Conflict Resolution in the Workplace*, in NEGOTIATION: STRATEGIES FOR MUTUAL GAIN (1993).

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5. If communications between employees and management are suffering and conflict is proliferating because of misunderstandings or misperceptions, an ombuds may be beneficial at both a systemic and individual level;

6. If management is caught by surprise by the emergence of significant workplace issues, an ombuds may minimize surprises by providing management feedback;

7. If management and unions are constantly at loggerheads, an ombuds may be able to provide an unofficial, but very helpful, communication link between the two parties;

8. If an agency has been faced with numerous claims of retaliation, either through EEO or grievance procedures, or the agency culture is such that employees are afraid to bring matters forward for fear of retaliation, establishing an ombuds office may provide an avenue through which complaints can surface with fewer concerns about retaliatory conduct.²⁵⁹

B. Designing the Ombuds Office

If the agency decides that an ombuds's function may be appropriate, how should it be designed? How should the agency go about establishing the office; what are the essential elements to be included in every design? Experiences reported by several agencies suggest some answers. Generally, the ombuds offices in this Article were created by a high-ranking government official, perhaps in consultation with a few other high-ranking officials, without broader solicitation of opinions. While this appeared to have worked for some agencies, interviewees from at least two agencies reported that the office experienced significant and arguably unnecessary barriers and delays because of the agency's failure to solicit input from stakeholders such as the union, employee groups and junior and mid-level management, prior to establishing the office. This experience is consistent with recent ADR design theory advising that, prior to initiation of ADR

²⁵⁹ Interviews with individuals familiar with ombuds offices in federal agencies indicate that ombuds have also been helpful in resolving disputes addressing agency FOIA requests, ethics violations and issues within the jurisdiction of the Inspector General.

programs, stakeholders' views and participation be solicited and integrated as much as possible into the dispute resolution design.²⁶⁰

The second step is to identify key elements essential to the efficient and effective functioning of an agency ombuds office. Interviewees repeatedly underscored the need for confidentiality unless the inquirer waives that right. Maintaining confidentiality is more complicated than might meet the eye. Obviously, the ombuds must be an individual of integrity who understands the need for confidentiality and is capable of not disclosing information without authorizations. Maintaining confidentiality also requires attention to such details as office, computer and telephone security, office location and record retention/destruction schedules.

Another essential component is that an ombuds office be designed to maximize the likelihood of its ability to maintain neutrality and independence. Agencies have enabled their ombuds to meet these needs in different ways. In one agency, not among the case studies, the ombuds was chosen near the end of her career. In that way, the ombuds is less likely to be concerned about making unpopular, but appropriate, choices. In all but one, the ombuds office is run by a senior-level person, either a GS-15 or an SES. Ombuds are not part of line management and, except in the State Department, have no collateral line management duties or responsibilities that might conflict with their ombuds's requirements. Finally, each of the ombuds reports to a senior-level manager within the agency, again minimizing the likelihood of challenges to neutrality. As one ombuds described, a senior-level manager once attempted to influence the ombuds's actions, and the ombuds was unable to resolve the matter himself.²⁶¹ Because the ombuds reported directly to the director, he was able to seek the director's assistance and immediately stop the inappropriate pressure.

At another level, design issues include such questions as: To whom should the ombuds report? How should the ombuds be selected and what qualifications should she possess? How will this office interface with other agency personnel with workplace dispute resolution responsibilities? What

²⁶⁰ See, e.g., CATHY A. COSTANTINO & CHRISTINA L. SICKLES, *DESIGNING MERCHANT CONFLICT MANAGEMENT SYSTEMS* 49 (1996); WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED; DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT* (1988); Systems Design Work Group, Administrative Conference of the United States, *Dispute Systems Design Pre-Design Organizational Checklist* (June 30, 1993) (on file with author).

²⁶¹ See Interview with Robert Henry, *supra* note 38.

access will the ombuds have to information and documents within the agency?

Based on interviewees' responses, placement of the ombuds office within the agency hierarchy appears to depend on several factors. Most ombuds and many other interviewees believed that the ombuds would be most effective if she reported to the head of the agency or division. Because the ombuds has no direct line authority, they believed that the higher the link, the more persuasive the ombuds, both in perception and reality. Of the five case studies, four reported to the head of the agency or division. One did not; she did not express any frustrations with respect to this arrangement, but she did note that her supervisor was very careful to keep her apprised of developments, and she, at least theoretically, had access to the agency director. This view is supported by the experiences of one agency, not in the case study, in which the ombuds position was moved from reporting to the agency head to the head of personnel. Under these circumstances, the ombuds's ability to function was severely curtailed.

Selection of the ombuds is also an issue to be addressed. In four of the five agencies, the ombuds was an experienced individual who had been in the agency for a period of time. In one agency, the ombuds was brought in from outside.²⁶² Only one ombuds had previously worked in a program that furthered the mission of the agency. The other four came from support functions such as human resources and mental health professions. None of the individuals were previously familiar with the practice of ombuds. However, the interviewees were almost uniform in their belief that the ombuds must convey a sense of personal integrity, including the ability to maintain confidentiality and neutrality, to listen and care without becoming personally involved and to have a backbone to fight in those occasions when it is necessary and appropriate.

²⁶² Research suggests that a possible relationship exists between the amount of time an ombuds has spent in an organization and the ways the ombuds's role is enacted. For example, the ombuds who has greater "connectedness" to the organization is more likely to be a "helping" ombuds, i.e., one who "invent[s] individualized solutions to the problems people present." An ombuds who is newer to an organization and may not have informal networks is more likely to be a "fact-finding" ombuds, i.e., one who "investigate[s] whether proper procedures were followed and if there are plausible explanations for a complaint." Based on the information gathered for this Article, other factors such as type of educational background, relationship to and support of top management and personal style may also impact how the ombuds's role is enacted. *See id.*; *see also* Kolb, *supra* note 8, at 673.

How the ombuds office will interface with other agency personnel and offices appears to depend on several factors. In each agency, there is a very strong sentiment that the ombuds's office should not be designed or perceived as a substitute for formal agency processes such as EEO, administrative and union grievances. It appears that once the ombuds has developed a trusting relationship with the other offices—often a matter of years of acute attention and care—the other dispute resolution offices will unofficially allow the ombuds more flexibility in dealing with matters that arguably belong in one of the other processes.

Another important issue in design is determining the ombuds's access to information within the agency or relevant division. The ombuds found different ways to obtain the information they needed to function effectively. In the case studies, some of the ombuds participated in senior-level staff meetings on a regular basis, others attended periodically and still others did not attend.²⁶³ All ombuds participated in various agency task forces and working groups that enabled them to gather relevant information. All but one office had authority to request and obtain documents from any office in the agency as necessary. The authority of one ombuds had never been tested because she obtained all relevant personnel documents from the inquirers themselves. Two ombuds were on a number of the agency's distribution lists. Two of the ombuds obtained a great deal of information by walking the halls and informally talking with employees.²⁶⁴ Another ombuds stated that she did not view that as contributing to the primary function of her ombuds role. The lesson, it appears, is that each ombuds must have adequate access to information. Specifically how that is accomplished must be consistent with the agency's culture and the ombuds's personal style.

C. Powers and Functions of the Federal Workplace Ombuds

None of the federal workplace ombuds had any authority to impose decisions. This was a matter of concern to many of the interviewees from

²⁶³ Interviewees mentioned that participation in senior staff meetings was a double-edged sword. It provided the ombuds with current information and issues of concern within the highest levels of the agency. It also helped to create a better working relationship between the ombuds and senior management. On the other hand, interviewees voiced concern that participation could create a perception problem that the ombuds was a part of management.

²⁶⁴ See *supra* notes 72, 182 and accompanying text.

overlapping offices who believed that ombuds would be far more effective if they had authority to impose resolution or change on a particular individual, office or agency.²⁶⁵ Even though the ombuds have no such authority, they are frequently able to serve as change agents on both a personal and systemic basis. Several ombuds mentioned that through their processes, they worked to “empower” the inquirer to handle a concern herself. Other interviewees from related offices noted that people frequently followed the ombuds’s recommendations merely because of the ombuds’s reputation for integrity and knowledge of the system and its people. Finally, some noted that the ombuds derived power from her ability to speak with the director. One interviewee in fact suggested that she would benefit from a reporting relationship with the director.²⁶⁶

Although the ombuds’s functions differed among the agencies, all emphasized the importance of listening to individual workplace concerns and empowering the inquirer as important components of the job. The greatest differentiation among the offices was the extent to which the ombuds worked as a systemic change agent. The ombuds at the Department of State spent a considerable amount of her time working toward systemic change. Of course, this time allocation was clearly consistent with her statutory mandate. Other offices did not have such a mandate and appeared to be sufficiently overwhelmed with individual cases that there was not as much time available to devote to systemic change.²⁶⁷

D. Confidentiality

The question of confidentiality within the federal government, perhaps more than any other, has the potential to create difficulties for the federal

²⁶⁵ According to Rowe, most ombuds who have practiced for a period of time come to appreciate the potency of reason and persuasion, as opposed to the power to impose decisions. Moreover, having the line authority to impose decisions likely would compromise an ombuds’s ability to function in a neutral, confidential fashion. *See* Telephone Interview with Dr. Mary P. Rowe, *supra* note 13.

²⁶⁶ Although not specifically mentioned by the interviewees, an ombuds’s power and influence may also come from rewarding good management and productive behavior, bringing bad behavior to the attention of more senior management, providing an alternative to the use of force, setting the example of moral authority and evincing a commitment to resolution or change. *See* Rowe, *supra* note 52, at 357–358.

²⁶⁷ This result may differ from research results which indicated that internal ombuds typically spent a quarter to a third of their time as internal management consultants, trainers and change agents. *See id.*

agency ombuds. As noted frequently above, the ability to maintain confidentiality is one of the immutable cornerstones of an ombuds office.²⁶⁸ As a federal court has noted:

[c]onfidentiality of communications is essential to relationships between the ombudsman's office and [the organization's] employees and . . . management. The function of the . . . ombudsman's office is [to] receive communications and to remedy workplace problems, in a strictly confidential atmosphere. Without this confidentiality, the office would be just one more non-confidential opportunity for employees to air disputes. The ombudsman's office provides an opportunity for complete disclosure, without the specter of retaliation, that does not exist in the other available, non-confidential grievance and complaint procedures.²⁶⁹

In the federal context, however, this requirement has the potential to conflict soundly with other federal statutory, regulatory and cultural requirements. For example, the following situations could, theoretically, compromise an ombuds's ability to maintain confidentiality:²⁷⁰ a request

²⁶⁸ ACUS recommended that, with respect to confidentiality in establishing regulatory ombudsman in federal agencies,

a. The . . . guidelines should protect communications to or from the ombudsman in connection with any investigation . . . , as well as the ombudsman's notes, memoranda and recollections, and documents provided in confidence to the ombudsman. The . . . guidelines should provide protection against disclosure in judicial, administrative, and congressional proceedings. . . .

b. An agency, when establishing an ombudsman, should explicitly disclaim authority ordinarily, to discover or otherwise force disclosure of an ombudsman's notes, memoranda or recollections, or of documents provided to the ombudsman in confidence.

The Ombudsman in Federal Agencies, Admin. Conf. of the United States, Recommendation 90-2, 1 C.F.R. § 247 (1993).

²⁶⁹ *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570, 572 (E.D. Mo. 1991).

²⁷⁰ Until recently, there was a growing body of case law that supported establishing an ombuds privilege. In the federal courts, see, *e.g.*, *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570, 572 (E.D. Mo. 1991); *Shabazz v. Scurr*, 662 F. Supp. 90, 92 (S.D. Iowa 1987). Additionally, the Supreme Court recognized the existence of a psychotherapist-patient privilege, expanding the scope of Rule 501 of the Federal Rules of Evidence. See *Jaffee v. Redmond*, 518 U.S. 1, 64 U.S.L.W. 4490, 4492 (U.S. June 13, 1996) (No. 95-266). This was thought to support the existence of the ombuds privilege. In June 1997, however, the Eight Circuit called the Ombuds privilege into

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under FOIA,²⁷¹ a request for information from the agency Inspector General's office,²⁷² or an allegation to the ombuds of government waste, fraud, or abuse outlining in convincing detail the inquirer's participation.²⁷³ Related to these claims is, again theoretically, the increased likelihood of availability of documents because of the government's record retention policy that makes no special provisions allowing for destruction of ombuds case records in a timely fashion.²⁷⁴ That the ombuds in the case studies were able to maintain confidentiality, both in terms of nondisclosure of information and timely destruction of documents may be more a factor of ignoring these regulations or thus far avoiding challenges, rather than finding creative ways of complying.

From 1990 until its sunset in fall 1995, the Administrative Dispute Resolution Act²⁷⁵ partially addressed some of these problems. The Act, passed largely through the efforts of the now-defunct ACUS,²⁷⁶ established a statutory framework for federal agency use of ADR. Although ombudsmanry was not specifically identified as an ADR process, it was

question in *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir.). The reach of this decision is unclear because the decision appeared to turn in large part on the paucity of evidence put forth by McDonnell Douglas. Unlike the attorney-client privilege, the ombuds privilege rests in the office, not the client.

²⁷¹ The Freedom of Information Act, 5 U.S.C. § 552 (1994), requires that each agency make available to the public requested documentation unless it falls within one of nine exemptions contained in § 552(b). The potential problem is two-fold: typical agency procedure requires a member of the General Counsel's Office to review documents to determine whether exemptions apply, thus breaching confidentiality. Second, this could potentially result in the disclosure of documents pursuant to the request if no exemption applies. *See* Freedom of Information Act, 5 U.S.C. § 552.

²⁷² Inspector General Act of 1978, 5 U.S.C. app. (1994).

²⁷³ *See* Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.101(b)(11) (1997). This section requires that employees shall disclose waste, fraud, abuse and corruption to appropriate authorities. *See* Standards of Ethical Conduct for Employees of the Executive Branch, § 2635.101(b)(11).

²⁷⁴ *See generally* Federal Records Act, 44 U.S.C. chs. 21, 29, 31, 33 (1994); National Archives and Records Administration, 36 C.F.R. § 1228.1-1228.224 (1997).

²⁷⁵ *See generally* Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 stat. 2736 (codified as amended at 5 U.S.C. §§ 571-583).

²⁷⁶ In 1995, Congress failed to authorize appropriations for ACUS. The Conference closed its doors in October 1995. Under the Act, the Conference was charged with implementation of the Act.

generally assumed to be covered by the Act.²⁷⁷ The confidentiality provisions²⁷⁸ provided that a neutral and parties to a dispute resolution proceeding were precluded from disclosing any information concerning a dispute resolution communication unless the parties agreed, the communication had already been made public, the communication was "required by statute to be made public," or a court determined disclosure was, on balance, necessary.²⁷⁹ The Act did not help, however, in the event of a FOIA request because Section 574(j) explicitly stated that the Act was not a statute specifically exempting disclosure under FOIA.

As one of its final acts before adjourning, Congress passed the Administrative Dispute Resolution Act of 1996, and on October 19, 1996, President Clinton signed it into law.²⁸⁰ The 1996 Act specifically includes the practice of ombuds as a form of ADR.²⁸¹ The Act increases protection from disclosure under FOIA for dispute resolution communications between a neutral and a party, while generally maintaining the confidentiality provisions described above, except that it provides greater protection from disclosure to dispute resolution communications generated by a neutral.²⁸² There is one note of caution, however. Under the Act, the confidentiality provisions are not triggered unless a "neutral is appointed," "specified parties participate" and the ADR process is "used to resolve an issue in controversy."²⁸³ "Issue in controversy" is further defined as "an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement (A) between an agency and persons who would be substantially affected by the decision; or (B) between persons who would be substantially affected by the decision."²⁸⁴

²⁷⁷ See OFFICE OF THE CHAIRMAN, ADMIN. CONF. OF THE U.S., THE OMBUDSMAN: A PRIMER FOR FEDERAL AGENCIES 14 n.2 (1991).

²⁷⁸ See 5 U.S.C. § 574 (1994).

²⁷⁹ *Id.*

²⁸⁰ See Administrative Dispute Resolution Act of 1996, Pub L. No. 104-320, 110 Stat. No. 3870 (Supp II 1996).

²⁸¹ The Act amends Title 5, § 571(3) to read as follows: "'alternative means of dispute resolution' means any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and use of ombuds, or any combination thereof." *Id.* § 571(3).

²⁸² The Act amends 5 U.S.C. § 574(j)(1994). See *id.* § 574(j).

²⁸³ 5 U.S.C. § 571(6) (Supp. II 1996).

²⁸⁴ 5 U.S.C. § 571(8) (Supp. II 1996).

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This would suggest that the confidentiality safeguards in the Act will apply to only certain aspects of an ombuds's job.

This new law will also alleviate, although not totally remove, concerns about required disclosure under FOIA and will likely strengthen nondisclosure even under the Inspector General Act and the Office of Government Ethics regulations. It may also strengthen arguments for exceptions to record retention regulations.

VI. CONCLUSION

This survey of the work of ombuds offices in five different federal agencies strongly supports a conclusion that the establishment of a workplace ombuds office can have a beneficial, cost-effective impact on the functioning of an agency and its personnel.

